Supreme Court, U.S.
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No. 00-____

IN THE

Supreme Court of the United States

VINCENT RENZI, *et al.*,
Petitioners,

v.

CONNELLY SCHOOL OF THE HOLY CHILD, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether § 59-G-2.19(c) of the Montgomery County Code, which on its face provides an exemption from generally applicable zoning requirements that is available exclusively to private schools located on property owned or leased by religious institutions or by the government, violates the Establishment Clause.

2. Whether the test of *Lemon v. Kurtzman* should be modified as applied in religious-accommodation cases.

3. Whether courts evaluating Establishment Clause challenges to religion-specific exemptions from generally applicable laws must consider the burden the exemption imposes on third parties or nonadherents.

PARTIES AND CORPORATE DISCLOSURE

Petitioners are Vincent Renzi and Birgit Ehlers-Renzi, M.D., who were plaintiffs in the district court and appellees in the court of appeals. Respondent is the Connelly School of the Holy Child, Inc., which was the defendant in the district court and appellant in the court of appeals. Respondent is a wholly-owned subsidiary of the Society of the Holy Jesus, Inc. Montgomery County, Maryland, intervened as a defendant in the district court but did not appeal from the district court judgment and is not a party here.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Vincent Renzi and Birgit Ehlers-Renzi respectfully pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals is reported as *Ehlers-Renzi v. Connelly School of the Holy Child, Inc.*, 224 F.3d 283 (4th Cir. 2000), and is reprinted in the Appendix to this petition ("App.") at 1a. The opinion of the United States District Court for the District of Maryland is reported as *Renzi v. Connelly School of the Holy Child, Inc.*, 61 F. Supp. 2d 440 (D. Md. 1999), and is reprinted at App. 20a.

JURISDICTION

The judgment of the court of appeals was entered on August 14, 2000. A timely petition for rehearing and rehearing en banc was denied on September 8, 2000. App. 35a. On November 24, 2000, the Chief Justice granted an application for an extension of time in which to file this petition, extending the time to January 8, 2000. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution provides in pertinent part:

> Congress shall make no law respecting an establishment of religion . . . .

Section 59-G-2.19(c) of the Montgomery County Code provides:

> **Exemptions**. The requirements of the [special exception process] shall not apply to the use of any lot, lots or tract of land for any private educational institution, or parochial school, which is located in a building or on a premises owned or leased by any church or religious organization, the government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town within Montgomery County.

Other sections of the Montgomery County Zoning Ordinance are reprinted in Appendix D, at 37a.

STATEMENT OF THE CASE

Section 59-G-2.19(c) of the Montgomery County Code provides an explicitly religion-based exemption from generally applicable zoning requirements for any and all private schools located on property owned or leased by a religious

institution or by the government. It is not available to *any* other charitable, nonprofit or eleemosynary landowners. But it *is* available to *all* religious landowners, even if the school on the property is wholly unrelated to religious practice – indeed, even if the school on the property is owned and operated by a secular entity for purely secular ends. The district court held that the zoning law's express preference for religious landowners cannot be justified as an accommodation for religious practices and therefore violates the Establishment Clause of the First Amendment. A divided panel of the Fourth Circuit reversed.

As we elaborate below, this Court should grant review not only because the majority opinion below is in irreconcilable conflict with this Court's own decisions, but because the division in the opinions below reflects a more widespread division in the courts over principles fundamental to this Court's religious-accommodation and Establishment Clause jurisprudence. And the need for review is pressing, as legislative bodies across the nation struggle with the delicate task – delegated almost exclusively to such bodies by this Court's opinion in *Employment Division v. Smith*, 494 U.S. 872 (1990) – of ensuring that general laws do not impose genuinely significant burdens on religious practices.

A. Background

1. The Montgomery County Code generally requires that any party seeking to build on residentially zoned land a structure that does not conform to residential zoning requirements must apply for a "special exception" from those requirements before beginning construction. Zoning Ordinance § 59-C-1.31. The procedure for obtaining a special exception includes the filing of a petition detailing the proposed construction, a public hearing, and approval by the Board of Appeals. *Id.* §§ 59-G-1.21; 59-G-2.19. A special exception will be granted if the Board is satisfied that the improvements will be in conformity with specified frontage,

setback, screening and building coverage requirements, and will not adversely change the character of the residential community or constitute a nuisance because of traffic or exterior lighting.

One particular type of construction in residential areas, however, enjoys a categorical exemption from the special exception requirement: construction of, or additions or improvements to, "any private education institution" located on property "owned or leased by any church or religious organization." *Id.* § 59-G-2.19(c). To be clear: the exemption on its face does not apply only to private *religious* schools, but instead to *any* school *located on property owned or leased by a religious institution*. The exemption, in other words, actually benefits neither private schools nor religious schools as such, but rather religious-entity landowners or leaseholders who either operate schools on their property, or lease (or sublease) their property to others to operate private schools.[1] As the district court explained,

> under the terms of the ordinance, a religious organization could, for the purpose of obtaining income to support its religious purposes, lease property to a nonsectarian educational institution, even one operated for profit, which could construct facilities on the property without obtaining a special exception.

App. 28a. Thus the exemption explicitly divides landowners and leaseholders between the religious and nonreligious, favoring the former with a statutory benefit that allows them to demand higher rents for property leased to educational insti-

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[1] The exemption is self-executing; that is, a party seeking to take advantage of the exemption does not apply for it or seek approval in any other way. Rather, a party that believes it fits within the exemption simply starts building, leaving the burden on others who object to seek a stop-work order and an injunction requiring the party to go through the special exception process.

tutions than others who must rent property without promise of the same zoning advantage.

2. Respondent Connelly School of the Holy Child, Inc. ("Connelly School" or the "School") operates a private religiously-affiliated school in Montgomery County that is located on property owned by a Pennsylvania corporation that is a religious organization. The School is located in an area zoned for residential use and is surrounded by residential homes. Its campus consists of a large main building, two modular classrooms, a large home with an attached but non-functioning chapel, an elongated addition to its main building, two athletic fields, four paved parking lots, four unpaved parking areas, and a large dumpster area in front of the School.

In the spring of 1999, the School began to implement plans to construct a new building and several new parking lots. Neighbors of the school promptly voiced many concerns about the School's plans and asked the School to proceed through the special exception process. The School refused to make any changes to its construction plans in response to the neighbors' concerns, and also refused to seek a special exception on the ground that the Code exempts schools located on property owned by a religious organization.

With the exemption from the special exception process, the School will be allowed to install new parking lots and increase student traffic without performing traffic studies that would help ensure the safety of neighborhood children. The exemption also enables the School to install large commercial lighting structures in its new parking lots and on other parts of its campus, including lights that shine directly into the windows of adjacent homes. Finally, the exemption allows the School to construct a very large building that would significantly change the character of the neighborhood.

B. District Court Proceedings

Petitioners filed this lawsuit in May 1999 in the United States District Court for the District of Maryland, seeking a declaration that the religious-landowner zoning exemption on which the School was relying is unconstitutional, and an injunction stopping the School from continuing construction without obtaining a special exception. Montgomery County intervened as a defendant to defend the exemption.

On cross-motions for summary judgment, the district court (Motz, C.J.) declared the exemption unconstitutional and granted petitioners the requested injunction. The district court evaluated the challenge under the three-part test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-613 (1971), but primarily addressed only the first prong, invalidating the exemption on the ground that the exemption lacked a legitimate secular purpose.[2]

The defendants urged three possible secular purposes in defense of the exemption. First, the defendants argued that the exemption was intended to "encourage the use of underutilized public school facilities" in the county, because the exemption also applies to schools located on land owned by the state or federal government. App. 26a. The district court dismissed this asserted purpose out of hand, observing that it fails to explain the exemption for "schools located not on government property but on premises owned or leased by a church or other religious organization." *Id.* Second, the defendants argued that the exemption serves to promote education generally. But, as the district court pointed out, that asserted purpose again does not justify singling out for special favored treatment private schools located on property owned by religious institutions. App. 27a. In response, the School went so far as to argue that the exemption is nevertheless jus-

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[2] The district court also briefly addressed the religion-advancing effects of the exemption. App. 32a.

tified as secular because "religious education provides a societal benefit," *id.*, a proposition also rejected by the district court as flatly inconsistent with the core Establishment Clause principle that government cannot favor religion over nonreligion, App. 27a-28a.

Finally, the defendants argued that the religion-specific zoning exemption serves the legitimate secular purpose of alleviating government interference with religious practice. The district court rejected this argument for two reasons. First, the court explained, "it is impossible to glean from the language" of the exemption any purpose of alleviating interference with religious practices at all, inasmuch as "*any* private educational institution – whether sectarian or nonsectarian" is exempted so long as it is located on property owned or leased by a church or religious organization. App. 28a. Second, the court continued, providing any and all schools on property owned or leased by religious organizations an exemption from certain building requirements does not alleviate "*significant* government interference" in religious practices – specifically, "the activity of religious education" – as required by this Court's precedents, including *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327 (1987). App. 29a-30a.

C. Court of Appeals Proceedings

The proceedings in the Fourth Circuit drew significant attention from a number of public interest groups with a broader interest in the scope and limits of the Establishment Clause. Amicus curiae briefs were filed on behalf of, among others, the Becket Fund for Religious Liberty, the American Jewish Congress, the Convention of the Protestant Episcopal Church of the Diocese of Washington, the Roman Catholic Archdiocese of Washington, and two separate branches of the American Civil Liberties Union. *See* App. 1a.

1. The School appealed the district court's judgment, but the County chose not to defend its own statute on appeal.

And, for its part, the School abandoned most of its assertions about the possible secular purposes of the religion-based zoning exemption, and spent all of its energy arguing that the exemption is permissible because it "simply excuse[s] religiously-affiliated entities from regulatory burdens placed on others." Connelly Sch. Ct. App. Br. at 11. As the School read this Court's precedents, legislative "efforts to accommodate religion are *invariably* constitutional when the State simply chooses to relieve religious institutions of burdens placed on . . . society at large." *Id.* at 16 (emphasis added).

2. A divided panel of the Fourth Circuit reversed. The majority (per Niemeyer, J.) effectively accepted the Connelly School's premise that religion-specific exemptions intended to lift burdens on religion are "invariably" constitutional:

> Because the exemption applies to any private school located on land owned by a *religious* organization, religion is the defining aspect of the exemption, and we therefore believe the exemption plausibly aims to alleviate government interference with religion.
>
> At bottom, the exemption at issue in this case frees Connelly School from obtaining a special exception only because the school has a religious connection.

App. 14a (emphasis in original).

Having reached the ironic conclusion that the zoning exemption serves a *secular* purpose because it benefits only *religious* organizations, the majority went on to compound the irony, holding that even though the exemption benefits only religious organizations, it nevertheless does not have the effect of advancing religion: "Any advancement of religion," the majority explained, "would be the result of the schools' own acts in light of the exemption," not the result of the exemption itself. App. 15a. Thus, the majority rejected the district court's conclusion that the exemption would

impermissibly "advantage Connelly School over 'nonprofit nonsectarian private schools' by exempting Connelly School from density restrictions." App. 15a-16a. The majority reasoned that any commercial edge over other schools would ultimately have to come from the School's "enrollment policy and attraction of students," and not directly from the advantage conferred by the exemption itself. App. 16a.[3]

3. Judge Murnaghan dissented. In his view, the majority opinion "inappropriately expand[s] the *Amos* [accommodation] principle and, as a result, travel[s] down a path that will ultimately render the Establishment Clause meaningless." App. 18a.

First, Judge Murnaghan argued, "[a]pplication of the County's special exception procedures to the Connelly School would not significantly interfere with the school's ability to define and carry out its mission." *Id.*[4] Second, the exemption does not serve any secular purpose because it "applies not only to religious schools, but also to secular schools operated on property owned or leased by religious institutions." App. 19a. "If the ordinance were a legitimate effort to avoid interference with the mission of religious schools," Judge Murnaghan observed, "it would not be writ-

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[3] The majority further concluded that the exemption does not create excessive entanglement between the government and religion. App. 16a.

[4] Judge Murnaghan continued on this point:

> There is no danger that Montgomery County will become involved in regulating the school's *program* of religious education by simply enforcing the generally applicable zoning rules and special exception procedures at issue in this case. . . . There is an important difference between regulations that reach into an organization's program and personnel, on the one hand, and those that only impact the development of its physical facilities, on the other.

App. 18a.

ten so as to extend its benefits to schools that are not engaged in any sort of religious mission." *Id.*

Summarizing his disagreement with the majority's interpretation of the *Amos* accommodation principle, Judge Murnaghan argued that *Amos*, properly construed, reflects "a genuine effort to allow religious institutions to operate programs and thereby fulfill their missions without significant, substantive interference from the government." App. 19a. By contrast, he concluded, the religion-specific zoning exemption at issue here "looks very much like ordinary favoritism for religious property owners in Montgomery County." *Id.*

REASONS FOR GRANTNG THE WRIT

This case presents an ideal opportunity to clarify confusion among legislative bodies and lower courts across the nation – reflected in the divided opinions in this case – over a recurring and extremely important question, *viz.*, under what circumstances may a legislative body grant a religion-specific exemption from a generally applicable law?

This confusion persists despite the fact that this Court's religious accommodation precedents would appear to establish that to survive an Establishment Clause challenge, an exemption that benefits a religious organization must be more widely available to other groups, and that if it is not – if the exemption is "religion-specific," in other words – then the exemption must alleviate "significant governmental interference" with the free exercise of religion. *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987); *see Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989); *see generally infra* at 14-15.

The decision below cannot be reconciled with those seemingly straightforward principles. The zoning exemption in this case applies to *all* private schools located on property owned or leased by religious organizations, and thus cannot

be intended to alleviate government interference with the religious exercise of the schools. It is, rather, a naked preference for religious landlords over nonreligious landlords. Accordingly, the decision below conflicts not only with accommodation cases like *Texas Monthly* and *Amos*, but also with all of the many cases identifying government neutrality toward religion as the essence of the Establishment Clause's requirements. *See infra* note 5. Indeed, as the dissent recognized, the majority's approach threatens to "render the Establishment Clause meaningless." App. 18a.

The square conflict with controlling decisions of this Court on this important question suffices to warrant review. *See* S. Ct. Rule 10(c). But that is not the only reason to grant the petition. Numerous conflicts have arisen in and among the courts over the permissibility of religion-specific accommodations. In fact, every recent judicial decision on the issue has been sharply divided, some with dissents that – as here – accuse the majority of abandoning central Establishment Clause values. This case, moreover, implicates a direct split in the courts over whether the tripartite test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), has been modified as it applies to religious-accommodation challenges. This case also reflects a division in authority over whether this Court's religious-accommodation precedents require a court to consider the burdens a purported accommodation places on those who do not benefit from the exemption. Finally, this case exemplifies confusion in the lower courts, spawned by language in *Amos*, over whether an exemption that is intended to confer an explicit commercial advantage on religious practitioners is nevertheless neutral because it remains up to the religious practitioner to advance his or her religious mission.

The need for clear guidance on the important questions presented here has become all the more critical in the wake of *Employment Division v. Smith*, 494 U.S. 872 (1990), which effectively removed from the courts any authority to

mandate particular legislative accommodations to religious practice. *Smith* leaves it largely to the state legislative assemblies, county commissions, and town councils of the Nation to protect private religious practices from generally applicable legal burdens. This case presents an ideal vehicle for a decision that would help these entities find the line between permissible and impermissible religious accommodations. Indeed, by reducing the present confusion regarding the standards governing religious accommodations, a decision by this Court would likely even encourage legislative bodies to make appropriate exemptions from general laws so as to alleviate significant burdens on religious practice, a goal all agree is well worth pursuing.

I. THE DECISION BELOW CONFLICTS WITH THIS COURT'S DECISIONS GOVERNING RELIGIOUS ACCOMMODATIONS

The opinion of the majority below directly conflicts with this Court's precedents governing laws that exempt religious organizations or individuals from generally applicable legal burdens. The majority opinion does not simply misapply those principles, but instead rewrites them altogether, and in so doing strikes at the very heart of the religion neutrality mandate underlying *all* of this Court's Establishment Clause cases.[5]

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[5] *See, e.g., Mitchell v. Helms*, 120 S. Ct. 2530, 2541 (2000); *Agostini v. Felton*, 521 U.S. 203, 231 (1997); *Rosenberger v. Rectors & Visitors of the Univ. of Va.*, 515 U.S. 819, 839 (1995); *Mueller v. Allen*, 463 U.S. 388, 398-99 (1983). As articulated by Justice O'Connor, the fundamental rule is that, "[a]bsent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits." *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 715 (1994) (O'Connor, J., concurring).

A. This Court's Precedents Authorize Religious Exemptions Only Where The Exemption Is Widely Available Or Alleviates A Significant Burden On Religious Exercise

1. Consistent with the neutrality principle, this Court's cases authorize legislative bodies to exempt religious institutions or individuals from generally applicable legal burdens only under two basic circumstances. First, government may grant a religious-based exemption when the same exemption is "conferred upon a wide array of nonsectarian groups as well as religious organizations." *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (plurality); *see, e.g., Mueller v. Allen*, 463 U.S. 388, 397 (1983) (upholding tax deduction "available for educational expenses incurred by *all* parents, including those whose children attend public schools and those whose children attend nonsectarian private schools or sectarian private schools"); *Walz v. Tax Comm'n*, 397 U.S. 664, 672-73 (1971) (upholding tax exemption that did not "single[] out" religion, but instead "granted [an] exemption to all houses of religious worship within a broad class of property owned by nonprofit, quasi-public corporations which include hospitals, libraries, playgrounds"); *see also Widmar v. Vincent*, 454 U.S. 263, 274 (1981) (authorizing use of public forum by religious group because "the forum is available to a broad class of nonreligious as well as religious speakers"). As the plurality opinion in *Texas Monthly* noted, "[i]n all of these cases" the Court "emphasized that the benefits derived by religious organizations flowed to a large number of nonreligious groups as well." 489 U.S. at 11. By making an exemption widely available, government obviously does not favor religion over nonreligion, and thus hews closely to the line of neutrality commanded by the Religion Clauses. *See Mitchell v. Helms*, 120 S. Ct. 2530, 2541 (2000) ("If the religious, irreligious, and areligious are all alike eligible for governmental aid, no one would conclude

that any indoctrination that any particular recipient conducts has been done at the behest of the government.").

2. At the same time, however, this Court's cases also "leave no doubt that in commanding neutrality the Religion Clauses do not require the government to be oblivious to the impositions that legitimate exercises of state power may place on religious belief and practice." *Kiryas Joel*, 512 U.S. at 705. Thus, government may confer an exemption from generally applicable laws that is *not* widely available to other, secular groups – that is "religion specific," in other words – so long as the purpose of the exemption is to "accommodate" religious exercise by "alleviat[ing] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987).

But obviously *all* religion-specific exemptions lift *some* burden on religious organizations, and it is common ground that "[a]t some point, accommodation may devolve into an unlawful fostering of religion." *Amos*, 483 U.S. at 334-35 (internal quotation marks deleted); *see Smith*, 494 U.S. at 890 (courts must identify the "appropriate occasions" for government creation of religious exemptions from generally applicable laws); *Kiryas Joel*, 512 U.S. at 722 (Kennedy, J., concurring) ("I agree that a religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment."); *Texas Monthly*, 489 U.S. at 40 (Scalia, J., dissenting) (at some point "accommodation slides over into promotion, and neutrality into favoritism"). After all, "[w]hat makes accommodation permissible, even praiseworthy, is not that the government is making life easier for some particular religious group as such. Rather, it is that the government is accommodating a deeply held belief." *Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring).

Accordingly, courts evaluating exemptions must be careful to "separate those benefits to religion that constitutionally accommodate the free exercise of religion from those that provide unjustifiable awards of assistance to religious organizations." *Amos*, 483 U.S. at 348 (O'Connor, J., concurring).

To ensure that an exemption does not violate the neutrality rule by serving simply as an "award[] of assistance to religious organizations," this Court has consistently emphasized that such exemptions must be intended to alleviate "significant" government interference with religious practices, *Amos*, 483 U.S. at 335, 338, or "special burdens" on religion, *Kiryas Joel*, 512 U.S. at 705, or "onerous duties," *Gillette v. United States*, 401 U.S. 437, 454 (1971), or "a significant state-imposed deterrent to the free exercise of religion," *Texas Monthly*, 489 U.S. at 15. The mere fact that an exemption lifts some burden on religion is not enough – and could not be enough – to justify an exemption that uniquely favors religious organizations over nonsectarian groups.

B. The Decision Below Conflicts With Controlling Decisions Of This Court And Undermines Fundamental Establishment Clause Principles

The zoning exemption at issue in this case is not widely available both to sectarian and nonsectarian groups; to the contrary, it is available only to religious landowners or leaseholders and to the government. Accordingly, the exemption is permissible under this Court's precedents only if it is intended to alleviate a "significant," "special" or "onerous" burden on the practice of religion.

The decision below disregards those precedents, however, instead upholding the exemption at issue here on the theory urged by the Connelly School, *viz.*, that burden-lifting exemptions are "invariably" constitutional. Connelly Sch. App. Br. at 16. As the court of appeals reasoned, because

"the exemption applies to any private school located on land owned by a *religious* organization, religion is the defining aspect of the exemption," and therefore "the exemption plausibly aims to alleviate government interference with religion." App. 14a (emphasis in original). Nowhere in its opinion does the panel majority make any effort to explain how the "defining aspect" of the exemption actually operates to alleviate *any* burden – much less a significant or special burden – on the religious practices of the religious organization that owns (or leases) the land on which a private school must be located to obtain the exemption. Instead, the court simply adopts the rule that so long as the exemption applies specifically to a religious institution, it must be understood as a plausibly secular accommodation.

It is impossible to reconcile that novel, *per se* rule with this Court's religious accommodation precedents, which have consistently required a showing that the exemption lifts a *significant* or *special* burden on or deterrent to the free exercise of religion. *See supra* at 15. Indeed, the court of appeals' opinion does not discuss or even cite *Texas Monthly*, the leading decision of this Court invalidating a religion-specific exemption.

Texas Monthly involved a statute exempting religious publications from a sales tax on magazine subscriptions. The plurality held that the exemption could not "reasonably be seen as removing a significant state-imposed deterrent to the free exercise of religion." 489 U.S. at 15. By contrast, the plurality explained, the Title VII exemption for religious employers at issue in *Amos* "prevented potentially serious encroachments on protected religious freedoms." *Id.* at 19 n.8. Justice Blackmun, joined by Justice O'Connor, agreed with the essential part of the plurality's analysis:

> In this case, by confining the tax exemption exclusively to the sale of religious publications, Texas engaged in preferential support for the communication

> of religious messages. Although some forms of accommodating religion are constitutionally permissible, *see* [*Amos*], this one surely is not.

Id. at 28 (Blackmun, J., concurring in judgment). At the very least, what the opinions in *Texas Monthly* establish is that *not* every religion-specific exemption that lifts a legal burden on a religion can be considered plausibly secular. The lesson of *Texas Monthly* – indeed, the lesson of all this Court's religious-accommodation cases – is that unless the exemption is intended to alleviate a serious, substantial deterrent to free exercise, it cannot be considered anything other than an impermissible preference for religion.

The court of appeals' refusal to accept and apply that basic lesson to the exemption at issue here is more than just a misapplication of this Court's religious accommodation standards. As we have seen, a showing that the exemption lifts a *significant* or *special* burden on free exercise is fundamental to the task of ensuring that the government is not simply providing an "award[] of assistance to religious organizations." *Amos*, 483 U.S. at 348 (O'Connor, J., concurring); *see supra* at 14-15. That requirement, in other words, operates to secure the principle of government neutrality toward religion that forms the very heart of the Establishment Clause itself. *See supra* note 5; *cf. Stark v. Independent Sch. Dist. No. 640*, 123 F.3d 1068, 1079 (8th Cir. 1997) (Murphy, J., dissenting) ("An asserted motivation of religious accommodation . . . cannot shield governmental actions that otherwise violate the principle of neutrality embedded in the establishment clause."). It is for that reason the dissent below was correct to observe that the majority's decision – which upholds a zoning exemption that "looks like ordinary favoritism for religious property owners" because it lifts no significant burden on their free exercise, App. 19a – guides courts and legislative bodies "down a path that will ultimately ren-

der the Establishment Clause meaningless." App. 18a. This Court should grant review to forestall that unwise venture.

II. FEDERAL AND STATE COURTS ARE DIVIDED OVER THE STANDARDS GOVERNING THE PERMISSIBILITY OF RELIGION-SPECIFIC EXEMPTIONS

The division among the opinions in this case mirrors a broader – and expanding – controversy in the federal and state courts over the kinds of exemptions that legislative bodies may confer on religious entities and individuals. Courts are divided not just over how to apply the standards governing religious accommodation, but in various ways over the nature of the standards themselves.[6]

A. The Decision Below Is One In A Series Of Recent Decisions Sharply Divided Over The Validity Of Religious Accommodation Laws

1. In addition to the divided opinions in this case, within the last year a divided Eighth Circuit upheld, as a permissible example of religious accommodation, a religion-specific exemption from the medical oversight provisions of the Medicare and Medicaid statutes. *See Children's Healthcare Is A Legal Duty, Inc. v. Min de Parle*, 212 F.3d 1084 (8th Cir. 2000). Just as we submit happened in this case, the dissent in *Children's Healthcare* concluded that "[t]he logic employed by the majority would allow nearly anything to be deemed a burden so as to permit an accommodation." 212 F.3d at 1106 (Lay, J., dissenting); *see id.* at 1107 ("today's

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[6] The opinion below joins and intensifies these divisions, but the Court need not necessarily address all of the controversies presented here to decide this case, for the explicit preference for religion upheld by the Fourth Circuit is impermissible under virtually any reasonable view of the relevant principles. Review would nevertheless enable the Court to alleviate substantial confusion among courts simply by reaffirming the fundamental principles enunciated above.

majority seems to allow the rallying-cry of 'accommodation' to rule the day").

2. Also within the last year, a divided First Circuit applied *Amos* and *Texas Monthly* to uphold a religion-specific land-use exemption. *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000), *petition for cert. filed* Sept. 20, 2000. The dissent, while describing the applicable legal standards as "fuzzy," *id.* at 11 (Torruella, J., dissenting), concluded that the exemption at issue there "eschews neutrality to place religion in an exalted position, exempt from the ordinary land-use decision making process," *id.* at 12. Analyzing the relative burden on religious practices levied by otherwise applicable zoning requirements, the dissent concluded: "Frankly, I cannot see that requiring religious users to participate in the ordinary process by which local land-use decisions are made amounts to such a burden on the exercise of religion as to justify a blanket preference like the Dover Amendment." *Id.* at 13.[7]

3. Most recently – just over two weeks ago – the California Supreme Court split 4-3 over the constitutionality of an amendment to the California landmark preservation statute providing an exemption for the noncommercial property of religious organizations. *East Bay Asian Local Dev. Corp. v. State*, 2000 WL 1864344 (Cal. Dec. 21, 2000). In upholding the exemption, the majority inexplicably held that all religion-specific exemptions have a secular purpose so long as

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[7] A petition for certiorari was filed in *Boyajian* on September 20, 2000. While we do not disagree with the need for review of the issues presented in *Boyajian* – for they are largely similar to those presented here – we note that *Boyajian* is complicated somewhat by the fact that the land-use exemption involved in that case is also available to a large number of secular groups, *see Boyajian*, 212 F.3d at 7, which is not true here. We believe this case therefore presents a better vehicle for evaluating a religious-accommodation exemption that is truly religion-specific. Should the Court grant the petition in *Boyajian*, however, we submit that the instant petition should be held pending resolution of that case.

they are intended to alleviate even "potential" – as opposed to "actual" – burdens on free exercise. *Id.* at *10; *see id.* at *11 ("We do not agree that an actual burden must be demonstrable before an exemption is constitutionally permissible.").[8]

Once again, the dissenting judges saw the majority's analysis as threatening fundamental Establishment Clause norms. As Justice Werdegar concluded in a lengthy and closely reasoned opinion, the majority, by not "requiring a showing . . . that application of the [land-use] regulations would impede any religious practice," was upholding an exemption that "go[es] far beyond a reasonable accommodation of the exercise of religion and . . . grants a significant, unjustified and preferential benefit to religious organizations," *id.* at *25, thereby "violating the fundamental principle of government neutrality in matters of religion," *id.* at *24. A separate dissent by Justice Mosk also attacked the majority's refusal to require an identifiable burden on religion:

> [I]t is not enough that local historic landmark preservation laws might in some conceivable situation impose some burden on a religious organization, however insignificant and however unrelated to a religious mission. The majority's flawed approach could be used to justify exempting religious organizations from any neutral law of general applicability.

Id. at *20 (Mosk, J., dissenting).

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[8] *But see Lee v. Weisman*, 505 U.S. 577, 629 (1992) (Souter, J., concurring) ("accommodation must lift a discernible burden on the free exercise of religion"); *Texas Monthly*, 489 U.S. at 18 n.8 (rejecting exemption because there is "[n]o concrete need to accommodate religious activity"); *Amos*, 483 U.S. at 348 (O'Connor, J., concurring) ("there must in fact be an identifiable burden on the exercise of religion that can be said to be lifted by the government action").

4. While the dissenting opinion of Justice Werdegar in *East Bay* is a compelling exposition of properly applicable principles, the question of which side was correct in that case, or in the others discussed above, is of course not the issue here. What matters for present purposes is that serious questions are arising on a regular basis among courts nationwide over the principles that govern, or should govern, religious accommodation. Like this case, all the cases just discussed generated substantial appellate briefing by a wide variety of religious and secular organizations as amici curiae, all seeking further clarity from the courts on these important matters. The splintered opinions in these cases have provided little of that much needed clarity. Review of this case and correction of the court of appeals' error would provide significant guidance to legislative bodies seeking to write into their laws appropriate accommodations for private religious practices. *See infra* at 27-29.

B. The Courts Are Divided Over Application Of The *Lemon* Test To Religious Accommodations

There is, of course, a well-recognized controversy in this Court's opinions over the continued viability of the *Lemon* test in *any* Establishment Clause context. *See Lamb's Chapel v. Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398-99 (1993) (Scalia, J., concurring in judgment) (citing cases); *see also Tangipoha Parish Sch. Bd. v. Freiler*, 120 S. Ct. 2706 (2000) (Scalia, J., dissenting from denial of cert.). This case certainly provides an appropriate vehicle for resolving the recurring debate over *Lemon*'s general viability, but the Court need not resolve that larger question here. This case presents the opportunity to consider a much simpler question about *Lemon*: whether the *Lemon* test has been (or should be) altered in cases involving religious accommodations. That question, too, has confused and divided the courts.

1. The Fourth Circuit in this case held that the "secular purpose" prong of *Lemon* had been "refined in *Amos* for statutory exemptions." App. 10a.[9] According to the majority, in this context *Lemon* requires the courts to "determine whether the government has 'abandon[ed] neutrality and act[ed] with the intent of promoting a particular point of view in religious matters.'" *Id.* (quoting *Amos*, 483 U.S. at 335) (alteration in original). Taking a slightly different tack, the Eighth Circuit has concluded that the religious accommodation cases require a modified application of the *Lemon* test's "effects" prong, at least as distinguished from the analysis of that prong adopted by this Court in *Agostini v. Felton*, 521 U.S. 203 (1997). *See Children's Healthcare*, 212 F.3d at 1095.

2. In contrast to the Fourth and Eighth Circuits, other courts have applied *Lemon* to religious accommodations without acknowledging any such alterations to the test. In fact, the California Supreme Court specifically concluded in *East Bay* that this Court "has not yet modified the test to accommodate [religious] exemptions." 2000 WL 1864344, at *7; *see also Boyajian*, 212 F.3d at 4-10 (applying unadulterated *Lemon* test). But the *East Bay* court also called the *Lemon* test "ill suited to assessing accommodating religious exemptions from neutral, generally applicable laws." *Id.* at *9. And the dissenting judge in *Boyajian* criticized the standards governing religious accommodations as "fuzzy." 212 F.3d at 11 (Torruella, J., dissenting).

3. Opinions from members of this Court have raised similar questions over how *Lemon* should apply to religious-accommodation cases (assuming it applies at all). For instance, while the majority in *Amos* explicitly rejected the opportunity to modify or dispense with any aspect of the

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[9] In fact, the court applied *Lemon* only grudgingly. *See* App. 8a (noting that the "test has been frequently criticized in its applications").

Lemon test, *see Amos*, 483 U.S. at 335 ("we need not reexamine *Lemon* as applied in this context, for the exemption involved here is in no way questionable under the *Lemon* analysis"), Justice O'Connor's opinion concurring in the judgment saw things differently. Her opinion suggested that in evaluating the "effects" of religion-specific exemptions, courts must openly recognize that "such government action *does* have the effect of advancing religion," *id.* at 348, even though the action may still be permissible under the "endorsement" version of the *Lemon* test as Justice O'Connor would frame it, *id.* Justice O'Connor made much the same point in respect to the "purpose" prong of the *Lemon* test in *Wallace v. Jaffree*, 472 U.S. 38 (1985): "It is disingenuous to look for a purely secular purpose when the manifest objective of a statute is to facilitate the free exercise of religion.... Instead, the Court should simply acknowledge that the religious purpose of such a statute is legitimated by the Free Exercise Clause." *Id.* at 83 (O'Connor, J., concurring). Justice Scalia, on the other hand, has argued that "rather than reformulating the *Lemon* test in 'accommodation' cases . . . one might instead simply describe the protection of free exercise concerns, and the maintenance of the necessary neutrality, as 'secular purpose and effect.'" *Texas Monthly*, 489 U.S. at 40 (Scalia, J., dissenting).

Review of this case would enable the Court to resolve the controversy among the courts, and in its own opinions, over application of the *Lemon* test to religious accommodation cases.

C. The Courts Are Divided Over The Role Of Third-Party Burdens In Religious Accommodations Challenges

The opinion below diverges from the opinions of other courts in yet another respect: the opinion below upholds a religion-specific exemption without any consideration of the burdens the exemption imposes on third parties (including

petitioners). In this regard, the opinion conflicts not only with those of other federal and state courts, but with the decisions of this Court as well.

1. This Court's religious-accommodation cases have consistently emphasized that an important factor in the permissibility of an accommodation is whether it "burdens nonbeneficiaries markedly." *Texas Monthly*, 489 U.S. at 15; *see Amos*, 483 U.S. at 337 n.15 (Title VII exemption for employers does not constitute government-imposed burden on employees); *id.* at 340-46 (Brennan, J., concurring) (balancing burden on non-religious employees with burden on employer's religious exercise); *Kiryas Joel*, 512 U.S. at 722 (Kennedy, J., concurring) ("a religious accommodation demands careful scrutiny to ensure that it does not so burden nonadherents or discriminate against other religions as to become an establishment"); *cf. Estate of Thornton v. Caldor, Inc.*, 472 U.S. 703, 708 (1985) (invalidating statute requiring accommodation of employees' Sabbath observance because statute creates "an absolute, unqualified right" for employee "no matter what burden or inconvenience this imposes on the employer or fellow workers").

2. Following those precedents, the Eighth Circuit held in *Children's Healthcare* that a religious accommodation is impermissible when it "imposes a substantial burden on nonbeneficiaries." 212 F.3d at 1095; *see id.* at 1096-97 (analyzing burdens on taxpayers imposed by religion-specific Medicare and Medicaid exemption). The other opinions discussed above all examined the effects of accommodation on third parties as well. *See East Bay*, 2000 WL 1864344, at *13 ("There is no measurable or identifiable cost to others that can be attributed to an exemption from landmark status."); *id.* at *40 (Werdegar, J., dissenting) (discussing burdens on community of loss of landmark designations); *Boyajian*, 212 F.3d at 8-9 (balancing accommodating aspects of land-use exemption with burdens on neighboring communities).

3. In contrast to the approach taken by these courts, the Fourth Circuit in this case did not consider the burdens imposed on third parties as a result of the religious exemption. *See* App. 1a-19a. And those burdens are plainly substantial: the exemption allows the School to expand its facilities without any regard whatsoever for the potential increase in neighborhood traffic, the glare of lights into neighbors' homes, and the overall effect on the surrounding area.

The Fourth Circuit is not alone in failing to include third-party burdens in its analysis of religious accommodations. The Seventh Circuit similarly neglected any such consideration in upholding another religion-specific land-use exemption in *Cohen v. City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993). And though the Ninth Circuit considered third-party burdens in *Thomas v. Anchorage Equal Rights Comm'n*, 165 F.3d 692 (9th Cir. 1999), the court adopted an inexplicably narrow approach, holding that only "religious" burdens matter, and that "economic" harms to nonbeneficiaries "are beyond the pale of the Establishment Clause," *id.* at 718. The California Supreme Court's *East Bay* opinion is to the same effect. *See* 2000 WL 1864344, at *13 ("That other nonprofit organizations do not benefit [from the land-use exemption] is not relevant in assessing neutrality since landmark status for properties they own does not threaten any free exercise rights of those organizations.").

This case thus presents the opportunity to answer the question whether (and how) burdens on third parties must be considered in the analysis of religious accommodations.

D. Ambiguous Language In *Amos* Has Caused Confusion In This Case And Others

The majority opinion in this case was partly led astray by a single passage in *Amos*, a passage that has caused confusion elsewhere as well:

> A law [exempting religious organizations] is not unconstitutional simply because it *allows* churches to advance religion, which is their very purpose. For a law to have forbidden 'effects' under *Lemon*, it must be fair to say that the *government itself* has advanced religion.

Amos, 483 U.S. at 337. Even as those words were written, Justice O'Connor foresaw the confusion they would wreak:

> [T]he Court seems to suggest that the 'effects' prong of the *Lemon* test is not at all implicated as long as the government action can be characterized as 'allowing' religious organizations to advance religion, in contrast to government action directly advancing religion. This distinction seems to me to obscure far more than to enlighten. Almost any benefit to religion could be recharacterized as simply "allowing" a religion to better advance itself, unless perhaps it involved actual proselytization by government agents. In nearly every case of a government benefit to religion, the religious mission would not be advanced if the religion did not take advantage of the benefit; even a direct financial subsidy to a religious organization would not advance religion if for some reason the organization failed to make any use of the funds.

Amos, 483 U.S. at 347 (O'Connor, J., concurring).

Justice O'Connor's fears were realized in this case. Relying on the passage quoted earlier, the majority below held that even though the exemption here confers an apparent commercial advantage on religious landowners, that advantage does not have the effect of advancing religion because the "potential benefit" results not directly from the exemption itself, but from "Connelly School's enrollment policy and attraction of students." App. 16a. The California Supreme Court majority in *East Bay* went so far as to conclude that *Amos* means any "economic advantage" conferred by a

religion-specific exemption is "not relevant" to Establishment Clause analysis. *East Bay*, 2000 WL 1864344, at *12.

As Justice O'Connor warned, by the logic of such reasoning, *no* exemption conferred exclusively on religious institutions would have the effect of advancing religion, because those institutions ultimately attract adherents only by the persuasive power of their religious messages. On this view, it can *never* be "the government itself" that is advancing religion.

It is difficult to imagine that the *Amos* Court intended for its statement to be taken to that extreme, for such logic eviscerates both this Court's religious-accommodation cases and the Establishment Clause neutrality principle they seek to embody. An exemption that amounts to an award of assistance to a religious organization must be impermissible *even though* such matters as, for example, a religious school's "enrollment policy and attraction of students" also affect the success of the religious message. The lesson of this Court's cases is that government may accommodate religious practices; it may not dole out rewards for religious practices. Inasmuch as the statement in *Amos* has been taken to undermine that essential rule, the Court should grant review to clarify the meaning of its precedent.

III. THE ISSUES PRESENTED BY THIS PETITION ARE RECURRING AND IMPORTANT

The cases discussed thus far show for themselves that the issues raised in this petition are recurring and important. As noted above, this case is one of four closely divided appellate cases to have addressed these issues in just the last year. And, as also noted, all of these cases involved significant participation from religious and secular amici with a strong interest in these matters. The land-use and zoning context in which the religious-accommodation problem arises here, moreover, has proved especially fertile ground for such controversies. In addition to this case, *East Bay*, *Boyajian*, and

Cohen,[10] the news media have recounted numerous other zoning disputes that have arisen in communities across the nation over the construction or expansion of houses of worship. *See, e.g.*, David W. Dunlap, *God, Caesar and Zoning*, N.Y. Times, Aug. 27, 2000 §11, at 1; Hamil R. Harris, *Congregations Need More Than Faith to Build a Sanctuary in Prince George's County*, Wash. Post, February 13, 2000, at C1; Sherry Jacobson, *Religious Bill Draws Opposition; Plano Neighbors Wary of Zoning Exemption*, Dallas Morning News, Mar. 6, 1999, at 36A; Jane Lampman, *Uneasy Neighbors*, Christian Science Monitor, September 21, 2000, at 13; Lisa Grace Lednicer, *Church Fights New Limits On Industry Land*, Portland Oregonian, June 17, 1998, at B2; Marylynne Pitz, *Buddhist Temple, Neighbors At Odds*, Pittsburgh Post-Gazette, Nov. 28, 2000, at D-1.

The need for clear rules governing religious accommodations in situations such as these has taken on increased urgency following this Court's decision in *Employment Division v. Smith*, 494 U.S. 872 (1990). The Court held in that case that the Free Exercise Clause does not generally *require* government to exempt religious institutions and individuals from generally applicable laws that impose burdens on religious practice. *See id.* at 888-89. Instead, the Court held, such exemptions are essentially the exclusive domain of legislative bodies. *See id.* at 890. As the Court put it, "a society that believes in the negative protection accorded to religious belief can be expected to be solicitous of that value in its legislation as well." *Id.* Thus, while exemptions for religious practices may be "permitted" and even "desirable," *courts* cannot *mandate* them as a constitutional matter. *Id.*; *see City*

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[10] *See also Rector, Wardens & Members of the Vestry of St. Bartholomew's Church v. City of New York*, 914 F.2d 348 (2d Cir. 1990); *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988).

of Boerne v. Flores, 521 U.S. 507, 544 (1997) (Scalia, J., concurring in part) (discussing holding of *Smith*).

We fully agree that under appropriate circumstances exemptions for religious practices from laws that impose serious burdens on those practices, or burdens that fall with disproportionate force on those practices, are desirable and ought to be encouraged. But we also believe this Court's cases are correct in holding that exemptions are equally *un*-desirable when they amount to an award for religious practice. While in our view this case is an easy one, it will very often be difficult for legislative bodies, working in good faith, to identify the line between permissible and impermissible exemptions on the basis of the few cases this Court has decided on the issue. And such bodies would naturally hesitate to adopt even desirable exemptions, for fear of suffering the costs of litigation, successful or not. Review of this case would thus not only help resolve the judicial controversies described above, it would also assist legislatures, county commissions and town councils across the nation in their salutary efforts to devise reasonable and appropriate exemptions from truly burdensome general laws.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

Birgit EHLERS-RENZI; Vincent Renzi,
Plaintiffs-Appellees,

v.

CONNELLY SCHOOL OF THE
HOLY CHILD,INCORPORATED,
Defendant-Appellant

The American Jewish Congress; The Becket Fund for Religious Liberty; The Convention of the Protestant Episcopal Church of the Diocese of Washington; General Conference Corporation of Seventh-Day Adventists; National Jewish Commission on Law and Public Policy; The Roman Catholic Archdiocese of Washington; Union of Orthodox Jewish Congregation of America; American Civil Liberties Union of Maryland; American Civil Liberties Union of the National Capital Area, Amici Curiae.

No. 99-2352.

United States Court of Appeals, Fourth Circuit.

Argued: May 2, 2000

Decided: August 14, 2000

Dated: January 3, 2001

ARGUED: John G. Roberts, Jr., Hogan & Hartson, L.L.P., Washington, D.C., for Appellant. Vincent D. Renzi, Potomac, Maryland, for Appellees. ON BRIEF: Gregory G. Garre, Hogan & Hartson, L.L.P., Washington, D.C.; William K. Wilburn, Sara Beiro Farabow, Seyfarth, Shaw, Fairweather & Geraldson, Washington, D.C., for Appellant. Kevin J. Hasson, Eric W. Reene, Roman P. Storzer, The Becket Fund for Religious Liberty, Washington, D.C., for Amici Curiae American Jewish Congress, et al. Arthur B. Spitzer, American Civil Liberties Union of the National Capital Area, Washington, D.C.; Dwight H. Sullivan,

American Civil Liberties Union of Maryland, Baltimore, Maryland, for Amici Curiae Unions.

Before WIDENER, MURNAGHAN, and NIEMEYER, Circuit Judges.

Reversed by published opinion. Judge NIEMEYER wrote the opinion, in which Judge WIDENER joined. Judge MURNAGHAN wrote a dissenting opinion.

OPINION

NIEMEYER, Circuit Judge:

Birgit Ehlers-Renzi and her husband, Vincent Renzi, Montgomery County, Maryland, homeowners who live across from a Roman Catholic school which is constructing improvements and additions to the school without obtaining a "special exception," challenge the constitutionality of Montgomery County Zoning Ordinance § 59-G-2.19(c), which exempts such schools from the special exception requirement. The Renzis contend that the ordinance violates the Establishment Clause of the First Amendment, as applied to the States through the Fourteenth Amendment.

The district court, agreeing with the Renzis, declared the ordinance unconstitutional and enjoined the school from continuing construction, except to complete a parking lot and sediment pond, on which construction had already begun. For the reasons that follow, we reverse.

I

The Connelly School of the Holy Child, Inc. ("Connelly School") operates a non-profit, college-preparatory school for young women in grades 6 through 12, under the auspices of the Roman Catholic Church. In the school, according to its catalog, "Christian values are not only taught in the classroom but put into practice," and students are required to take religion courses and attend masses. Connelly School opened in 1961 and is situated on ten acres of land on Bradley

Boulevard in Potomac, Maryland. The School and the land are owned by the Society of the Holy Child Jesus, Inc., a Pennsylvania corporation, which also operates under the auspices of the Roman Catholic Church. The school, which had an enrollment of 413 students during the 1999-2000 academic year, operates from a large main building, two modular classrooms located in trailers, and a home with an attached chapel. The property also includes athletic fields and parking lots.

After initiating a fund-raising campaign and hiring an architectural firm, Connelly School finalized plans to remove two existing structures, as well as the trailers, and to construct a 30,000 square-foot, two-story building to contain classrooms, a library, facilities for music and art programs, and other educational areas. The plans also provide for the construction of additional parking areas.

Before beginning construction, Connelly School informed neighboring landowners that it would not seek a special exception for its construction plans because § 59-G-2.19(c) of the Montgomery County Zoning Ordinance ("Zoning Ordinance") exempts from the special exception requirement parochial schools located on land owned or leased by a church or religious organization. After receiving that notice, the Renzis, who live across the street from Connelly School, requested that Montgomery County determine whether Connelly School was indeed exempt from the requirement to obtain a special exception. When the County ruled that Connelly School was exempt from the special exception requirement, the Renzis filed an administrative appeal with the Montgomery County Board of Appeals. They subsequently withdrew that appeal, however, and instead filed this action for a declaratory judgment and injunctive relief, alleging that the exemption and the school's reliance on the exemption violate the Establishment Clause of the First Amendment.

On cross-motions for summary judgment, the district court ruled that Zoning Ordinance § 59-G-2.19(c) violated the Establishment Clause. *See Renzi v. Connelly Sch. of Holy Child*, 61 F.Supp.2d 440 (D. Md. 1999). Applying the test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the court determined that the exemption in the Zoning Ordinance did not have a secular legislative purpose, rejecting Connelly School's argument that it encouraged the private use of under-utilized public-school facilities, promoted education, and alleviated governmental interference with religion. The court reasoned that even if the exemption did minimize such interference, "that purpose would be constitutionally insufficient" because it is "wholly conjectural and does not relate to any identified risk of 'significant' governmental interference with religious affairs." The district court also ruled that the exemption impermissibly advanced religion because it allowed religious schools to escape the density restrictions in the Zoning Ordinance that were applicable to secular schools and thereby more easily increase their enrollment and fulfill their financial obligations.

This appeal followed.

II

The Montgomery County Zoning Ordinance ordinarily requires private educational institutions and other nonresidential uses in residential areas to obtain a "special exception" before constructing improvements and additions, such as those planned by Connelly School. Zoning Ordinance § 59-C-1.31. To obtain a special exception, a private school is required to file a petition containing specified information, including a statement explaining "in detail how the special exception is proposed to be operated," and supported by a plat, drawings, and a site plan for the proposed construction. *Id.* §§ 59-A-4.22(a), 59-G-2.19(b). The petition may be granted only after public notice and hearing, *see id.*. § 59-A-

4.41(a), during which residents may testify on the petition, and the Board of Appeals may grant a special exception petition only if it finds that the private school's use "will not constitute a nuisance"; that it will be "housed in buildings architecturally compatible with other buildings in the surrounding neighborhood"; that it will not "affect adversely or change the present character or future development of the surrounding residential community"; and that it "can and will be developed in conformity with" various specified requirements, *id.* § 59-G-2.19(a). The Zoning Ordinance provides, in addition, that the special exception use must be inspected annually for compliance with restrictions imposed in connection with the special exception, that the special exception holder must respond to any ongoing complaints of noncompliance, and that the special exception use is subject to revocation. *See id.* § 59-G-1.3(a), (b), (e).

The requirement to obtain a special exception, however, does not apply to all nonresidential uses. In particular, Zoning Ordinance § 59-G-2.19(c) provides the following exemptions:

> The requirements of this section shall not apply to the use of any lot, lots or tract of land for any private educational institution, or parochial school, which is located in a building or on premises owned or leased by any church or religious organization, the government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town within Montgomery County.

While Zoning Ordinance § 59-G-2.19(c) exempts from the special exception requirement private schools located on property owned or leased either by the national, state, or local government or by a church or religious organization, it is the portion exempting a "parochial school, which is located in a building or on premises owned or leased by any church

or religious organization" that the Renzis challenge as improperly establishing religion.

Connelly School argues that the exemption created by Zoning Ordinance § 59-G-2.19(c) represents an appropriate effort by Montgomery County to accommodate religion "by simply excusing religiously-affiliated entities from regulatory burdens placed on others." It maintains that the exemption's purpose is to alleviate government interference with the ability of religious organizations to fulfill their religious missions; that its effect is to "make it easier" for religious organizations to advance religion: and that it avoids the entanglement "that would follow from subjecting religious schools to the special exception process."

The Renzis contend, on the other hand, that Zoning Ordinance § 59-G-2.19(c) evinces no secular legislative purpose and that it does not "remove a burden from the free exercise of relition" as required for Connelly School's "'accommodation of religion' argument." They argue that the exemption also indirectly aids religion. While they acknowledge that such aid is permissible if it arises from a neutral and generally applicable law, they maintain that it is impermissible when it "only benefits religious landowners." Finally, the Renzis argue that Zoning Ordinance § 59-G-2.19(c) fosters excessive government entanglement with religion because it "is likely to cause or intensify political fragmentation and divisiveness along religious lines."

We are thus confronted with the question of whether exempting a parochial school from the procedures and restrictions otherwise required to obtain a special exception in Montgomery County violates the Establishment Clause of the First Amendment.

III

The Establishment Clause prohibits Congress and, through the Fourteenth Amendment, the States from making

any law "respecting an establishment of religion." U.S. Const. amend. I; *see also Cantwell v. Connecticut*, 310 U.S. 296, 303-04, 60 S.Ct. 900, 84 L.Ed. 1213 (1940). "Establishment" connotes "sponsorship, financial support, and active involvement of the sovereign in religious activity." *Walz v. Tax Comm'n*, 397 U.S. 664, 668, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970). But recognizing that "this Nation's history has not been one of entirely sanitized separation between Church and State," the Supreme Court has noted that it "has never been thought either possible or desirable to enforce a regime of total separation." *Committee for Pub. Educ. & Religious Liberty v. Nyquist*, 413 U.S. 756, 760, 93 S.Ct. 2955, 413 U.S. 756 (1973). Thus, the principle is "fixed" that a government program or law "which in some manner aids an institution with a religious affiliation" does not, for that reason alone, violate the Establishment Clause. *Mueller v. Allen*, 463 U.,S. 388, 393, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983).

But the prohibition against the establishment of religion does require government neutrality toward religion and among religions. *See Rosenberger v. Rector & Visitors of Univ. of Va.*, 515 U.S. 819, 839, 115 S.Ct. 2510, 132 L.Ed.2d 700 (1995); *Board of Educ. of Kiryas Joel Village Sch. Dist. v. Grumet*, 512 U.S. 687, 696, 114 S.Ct. 2481, 129 L.Ed.2d 546 (1994) (opinion of Souter, J.). And this neutrality may be a "benevolent neutrality." *Walz*, 397 U.S. at 669, 90 S.Ct. 1409. Indeed, the government is entitled to accommodate religion without violating the Establishment Clause, and at times the government must do so. *See Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Sainta v. Amos*, 483 U.S. 327, 338, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987) (The Establishment Clause provides "ample room for accommodation of religion"); *Hobbie v. Unemployment Appeals Comm'n*, 480 U.S. 136, 144, 107 S.Ct. 1046, 94 L.Ed.2d 190 (1987) ("[T]he government may (and sometimes must) accommodate religious practices");

Lynch v. Donnelly, 465 U.S. 668, 673, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (The Constitution" affirmatively mandates accommodation by government are not "co-extensive with the noninterference mandated by the Free Exercise Claus. *Amos*, 483 U.S. at 334, 107 S.Ct. 2862 (quoting *Walz*, 397 U.S. at 673, 90 S.Ct. 1409).

This authorized, and sometimes mandatory, accommodation of religion is a necessary aspect of the Establishment Clause jurisprudence because, without it, government would find itself effectively and unconstitutionally promoting the absence of religion over its practice. *See Lynch*, 465 U.S. at 673, 104 S.Ct. 1355 ("Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause"); *School Dist. of Abington Township v. Schempp*, 374 U.S. 203, 225, 83 S.Ct. 1560, 10 L.Ed.2d 844 (1963) ("[T]he State may not establish a 'religion of secularism' in the sense of affirmatively opposing or showing hostility to religion"); *Zorach v. Clauson*, 343 U.S. 306, 314, 72 S.Ct. 679, 96 L.Ed. 954 (1952) (To hold that the government may not respect[] the religious nature of our people and accommodate[] the public service to their spiritual needs" would be to "prefer[] those who believe in no religion over those who do believe").

The line between benevolent neutrality and permissible accommodation, on the one hand, and improper sponsorship or interference, on the other, must be delicately drawn both to protect the free exercise of religion and to prohibit its establishment. In *Lemon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), the Supreme Court articulated a test for drawing that line, a test that has since been frequently criticized in its application.[1] *See, e.g.*, Michael W.

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[1] This criticism has come even from members of the Supreme Court. *See, e.g., Kiryas Joel*, 512 U.S. at 718-19, 114 S.Ct. 2481 (O'Connor, J, concurring); *id.* At 750-51, 114 S.Ct. 2481 (Scalia, J., dissenting, joined by Rehnquist, C.J. and Thomas, J.); *Lamb's Chapel v. Center Moriches*

McConnell, *Religious Freedom at a Crossroads*, 59 U. Chi. L. Rev. 115, 118 (1992) (in the *Lemon* test, "the Court has contrived a formula for interpreting the Establishment Clause that contains inconsistencies within a single test"). And while cases since *Lemon* continue to apply and adapt the test to various circumstances, *see, e.g.*, *Mitchell v. Helms*, -- U.S. --, 120 S.Ct. 2530, 2540, 147 L.Ed. 660 (2000) (plurality opinion) (recognizing that the *Lemon* test has been "recast" and "modified . . . for purposes of evaluating aid to schools"), it has not been overruled, *see Koenick v. Fleton*, 190 F.3d 259, 265 (4th Cir. 1999) ("[T]he general principles we have relied on to evaluate Establishment Clause claims have not substantively changed since the *Lemon* line of cases was decided"). Under *Lemon*, for a legislative act to withstand an Establishment Clause challenge, (1) it must have a secular legislative purpose; (2) its principal or primary effect must neither advance nor inhibit religion; and (3) it must not foster excessive governmental entanglement with religion. *See* 403 U.S. at 612-13, 91 S.Ct. 2105. While the *Lemon* test thus provides "helpful signposts" for analyzing Establishment Clause challenges, *Hunt v. McNair*, 413 U.S. 734, 741, 93 S.Ct. 2868, 37 L.Ed.2d 923 (1973); *Mueller*, 463 U.S. at 394, 103 S.Ct 3062, the structure for its application to a religious exemption, such as that before us in this case, is more clearly provided by *Amos*, where the Court held that the exemption of religious organizations form the prohibition against religious discrimination in employment of Title VII of the Civil Rights Act of 1964 does not improperly establish religion in violation of the First Amendment. *See Amos*, 483 U.S. at 339-40, 107 S.Ct. 2862. Accordingly, we now apply the *Lemon* test as refined in *Amos* to analyze the exemption

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Union Free Sch. Dist., 508 U.S. 384, 398-400, 113 S.Ct. 2141, 124 L.Ed. 2d 352 (1993) (Scalia, J., concurring in the judgment, joined by Thomas, J.); *Wallace v. Jaffree*, 472 U.S. 38, 678-69, 105 S.Ct. 2479, 86 L.Ed. 2d 29 (1985) (O'Connor, J., concurring in the judgment).

of religious organizations from the requirements imposed by the Montgomery County Zoning Ordinance.

IV.

Under the first of *Lemons'* three prongs, we ask whether Zoning Ordinance § 59-G-2.19(c) has a "secular legislative purpose." *Lemon*, 403 U.S. at 612, 91 S.Ct. 2105. And as refined in *Amos* for statutory exemptions, we determine whether the government as "abandon[ed] neutrality and act[ed] with the intent of promoting a particular point of view in religious matters." *Amos*, 483 U.S. at 335, 107 S.Ct. 2862. This secular purpose prong presents a "fairly low hurdle," *Barghout v. Bureau of Kosher Meat & Food Control*, 66 F.3d 1337, 1345 (4th Cir. 1995), which may be cleared by finding "a plausible secular purpose" on the face of the regulation, *Mueller*, 463 U.S. at 394-95, 103 S.Ct. 3062.

Connelly School advances several plausible secular purposes revealed by the Montgomery County Zoning Ordinance. It notes that by exempting parochial schools from the special exception procedure, Montgomery County avoids the interference with such schools' religious missions that otherwise might result from subjecting the schools to the scrutiny and procedures that the Zoning Ordinance otherwise would require. Connelly School also notes that by "stepp[ing] out of the way of religion" the County avoids the creation of a forum in which anti-religious animus underlying opposition to a special exception petition might be expressed. These purposes are indeed plausibly evident on the face of the ordinance and have been found valid in analogous contexts by the Supreme Court in *Amos* and by this court in *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church*, 846 F.2d 260, 263-64 (4th Cir. 1988) (upholding exemption for religious daycare centers from licensing requirements). *See also Walz*, 397 U.S. at 673, 90 S.Ct. 1409 ("Grants of exemption historically guard against the danger of hostility toward religion").

In *Amos*, the Supreme Court applied *Lemon's* first prong to an exemption in Title VII of the Civil Rights Act of 1964 that permitted religious organizations to discriminate in employment on the basis of religion. The Court found that the exemption served a permissible secular purpose because it "alleviate[d] significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335, 107 S.Ct. 2862. This same reasoning applies to the exemption contained in Zoning Ordinance § 59-G-2.19(c). This exemption spares Connelly School from the rigorous review of numerous subjective factors that otherwise could interfere with implementation of its mission. The exemption from the special exception requirement relives Connelly School from having to justify its religious or religions-related needs before civil authorities and convince those authorities that the schools' renovations and additions satisfy such subjective requirements as, for example, "architectural[] compatib[ility]" or conformity with "the present character . . . of the community" Would a cross on a building offend citizens in the neighborhood? Would Gothic windows offend a neighborhood that was determined to maintain an American colonial style? Would a chapel or chapel bell or chapel organ offend? The exemption also extricates Montgomery County from the resolution of disputes that could have a religious underpinning. Would citizen challenges actually be cloaking anti-religious or anti-denomination animosity? In short, the low threshold of this first *Lemon* prong is readily cleared by the Zoning Ordinance's plausible purpose of extricating Montgomery County from these involvements in religion.

We reached the same conclusion in *Forest Hills*, in which we upheld an exemption of religious daycare centers from licensing requirements. We concluded that the exemption had the legitimate secular purpose of "avoid[ing] interference with the execution of religious missions in a non-profit area in which a church operates" and thereby "pre-

vent[ing] state interference with church programs that provide education and care for children" even though the instruction at the daycare centers may not have been explicitly religious. *Forest Hills,* 846 F.2d at 263-64.

When confronted with a similar circumstance, the Seventh Circuit reached a similar conclusion in *Cohen v. City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993), where it rejected a constitutional challenge to a zoning ordinance exempting church daycare centers from the requirement to obtaining a special use permit. Even though the exemption applied to daycare centers operated in churches irrespective of whether they provided religious instruction, the court held that it had "the secular purpose of minimizing governmental meddling in religious affairs notwithstanding that [it] does not explicitly state that [day-are centers] operated in churches in residential areas must give care or instruction defined as 'religious.'" *Cohen*, 8 F.3d at 491.

The Renzis urge that we reject the applicability of these precedents to this case, arguing that Zoning Ordinance § 59-G-219(c) reveals no secular purpose on its face because the literal language of the exemption reaches not only parochial schools but also any other private school that happens to be located on land owned by a religious organization. They argue that the breadth of this exemption belies any purpose to extricate Montgomery County from religious matters but rather indicates a purpose to favor religious landowners. In support of this argument, they conjure up hypotheticals involving use of the exemption by secular entities, such as a cosmetology school, that operate on land owned by a church. This argument fails on two levels.

First, it must be recognized that the Renzis are challenging the utilization of the exemption by a Roman Catholic school to construct improvements and additions to a school located on property owned by a corporation operated under the auspices of the Roman Catholic Church. Thus, we do not

have before us any of the hypothetical situations advanced by the Renzis. The Renzis respond by noting that they styled their action as a facial challenge and that therefore they may argue the constitutionality of the Zoning Ordinance under any hypothetical set of circumstances. But their standing derives from their status as neighbors challenging the particular improvements and additions being constructed by Connelly School, a religious school operated on property owned by a religious organization. The "traditional rule" is that one "to whom a statute may constitutionally be applied may not challenge that statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court." *Los Angeles Police Dep't v. United Reported Publishing Corp.*, -- U.S. --, 120 S.Ct. 483, 489, 145 L.Ed. 2d 451 (1999) (quoting *New York v. Ferber*, 458 U.S. 747, 767, 102 S.Ct. 3348, 73 L.Ed.2d 1113 (1982)); *Tilton v. Richardson*, 403 U.S. 672, 682, 91 S.Ct. 2091, 19 L.Ed.2d 790 (1971) (plurality opinion) (under the Establishment Clause, "[w]e cannot . . . strike down an Act of Congress on the basis of a hypothetical 'profile'" of a party not before the court).

Second, even if we look beyond the scope of the Renzis' challenge against Connelly School in this case, the possibility that the exemption would be applied in a completely religious setting is remote. The Zoning Ordinance does not exempt landowners but rather school uses. Thus, the ordinance exempts any private school located on property owned by a religious organization. Whether the school is denominated parochial or nonsectarian, the inquiry into the school's operation and its relationship to religion would risk the same religious entanglement. Because of this risk, in *Forest Hills* we expressly disavowed any inquiry into whether the activities undertaken by religious organizations were actually religious and we rejected the argument that an exemption for a religious organization is valid only if it performs a demonstrably religious function. *See* 846 F.2d at 263; *see also*

Amos, 483 U.S. at 336, 107 S.Ct. 2862 ("[I]t is a significant burden on a religious organization to require it . . . to predict which of its activities a secular court will consider religious"); *Cohen*, 8 F.3d at 490 ("It is not up to legislatures (or to courts for that mater) to say what activities are sufficiently 'religious'"). As James Madison put it in his *Memorial and Remonstrance Against Religious Assessments* of 1786, such an inquiry would "impl[y] . . . that the civil magistrate is a competent judge of religious truth," which is "an arrogant pretension." *The Complete Bill of Rights: The Drafts, Debates, Sources, and Origins* 48 (Neil H. Cogan ed. 1997). Because the exemption applies to any private school located on land owned by a *religious* organization, religion is the defining aspect of the exemption, and we therefore believe that the exemption plausibly aims to alleviate government interference with religion.

At bottom, the exemption at issue in his case frees Connelly School from obtaining a special exception only because the school has a religious connection. The very existence of the school is premised on a religious mission. *See Walz*, 397 U.S. at 671, 90 S.Ct. 1409 ("[T]o assure future adherents of a particular faith" is "an affirmative if not dominant policy of church schools"). An necessary to the fulfillment of this mission is the existence of facilities which Connelly School deems adequate to carry on its religious instruction. An official of the school stated this explicitly, averring that the school "needs to renovate in order to meet the educational and religious mission of the Roman Catholic Church, the Society [of the Holy Child Jesus], and the School." By removing the requirement to obtain a special exception, Montgomery County not only lifts a burden from the schools' exercise of religion but also extricates itself from potential interference with the school's religious mission.

The second prong of the *Lemon* test prompts inquiry into whether the statutory exemption has a "principal or primary

effect" that "neither advances nor inhibits religion." 403 U.S. at 612, 91 S.Ct. 2105. The Renzis argue that the exemption impermissibly advances religion by "providing religious organizations an exclusive benefit." While Connelly School acknowledges that Zoning Ordinance § 59-G-2.19(c) "may well indirectly promote the ability of religious organizations to carry out their *own* religious mission through the operation of the schools located on their property," it argues that the Establishment Clause only forbids advancement of religion by the government itself.

An exemption's effect of simply allowing a religious school to "better . . . advance [its] purposes" does not rise to a constitutionally prohibited magnitude. *Amos*, 483 U.S. at 336, 107 S.Ct. 2862; *see also Mueller*, 463 U.S. at 393, 103 S.Ct. 3062. An unconstitutional effect occurs when "the *government itself* has advanced religion through its own activities and influence." *Amos*, 483 U.S. at 337, 107 S.Ct. 2862. In *Forest Hills*, we applied *Amos* to uphold a law that "adopt[ed] a hands-off policy" in order to permit religious organizations "to advance their own teachings." *Forest Hills*, 846 F.2d at 263. Similarly, in this case, Montgomery County has relieved religious schools of the administrative burden of pursuing the special exception procedure. Any advancement of religion that follows would be the result of the religious schools' own acts in light of the exemption, as opposed to Montgomery County's elimination of an otherwise applicable requirement. *See Cohen*, 8 F.3d at 492 ("The religious component of child care and education activities in [the city] will come from church members or leaders, not from government officials"); *cf. Mitchell*, 120 S.Ct. at 2540 (plurality opinion) (examining, in the contest of aid to schools, "whether any religious indoctrination that occurs in those schools could reasonably be attributed to governmental action"). Thus, when the district court in this case observed that Zoning Ordinance § 59-G-2.19(c) would advantage Connelly School over "nonprofit nonsectarian pri-

vate schools" by exempting Connelly School from density restrictions, it identified a potential benefit resulting from Connelly Schools' enrollment policy and attraction of students, not from Montgomery County's policy of noninterference. *See Walz*, 397 U.S. at 668, 90 S.Ct. 1409 (identifying sponsorship, support, or involvement of the government in religion as the concerns of the Establishment Clause). Echoing *Amos*, "we do not see how any advancement or religion" that is achieved by Connelly School "can be fairly attributed to [Montgomery County], as opposed to the Church." *Amos*, 483 U.S. at 337, 107 S.Ct. 2862.

Finally, Zoning Ordinance § 59-G-2.19(c) plainly satisfies *Lemon's* third requirement that it not "foster 'an excessive entanglement with religion.'" 403 U.S. at 613, 91 S.Ct. 2105 (quoting *Walz*, 397 U.S. at 674, 90 S.Ct. 1409). Indeed, the parties appear to agree that it has a disentangling aspect, avoiding governmental intrusion into matters of religious education. *See Amos*, 483 U.S. at 339, 107 S.Ct. 2862 ("It cannot be seriously contended that [the challenged act] impermissibly entangles church and state; the statute effectuates a more complete separation of the two and avoids . . . [an] intrusive inquiry into religious belief"); *Cohen*, 8 F.3d at 493. While the Renzis rely on language in *Lemon* to argue that the exemption presents "divisive political potential," 403 U.S. at 622, 91 S.Ct. 2105, the Supreme Court subsequently confined this *Lemon* entanglement test to "cases where direct financial subsidies are paid to parochial schools or to teachers in parochial schools," *Mueller*, 463 U.S. at 403-04 n.11, 103 S.Ct. 3062.

V

Religion and the State wisely function in different arenas, but the people attending each arena are the same. Keeping religion and State distinct, while at the same time protecting the freedom of the people to act fully in both arenas, requires the State to recognize and even interact with religion, but not

to manage or incorporate the religious arena itself by favoring religion over non-religion, by favoring non-religion over religion, by favoring one religion over another, or by distinguishing among religions. The State does not engage in any of these establishment activities when it exempts religious institutions from land-use regulations. Rather, such an exemption removes the State from forums in which religious conflict might otherwise require improper State action.

By providing an exemption to parochial schools or to any private school on property owned by a religious organization, Montgomery County has permissibly accommodated religion by allowing these schools to operate or renovate their facilities without obtaining a special exception. We plow no new ground in reaching this conclusion, which follows ineluctably from the holdings in *Amos, Forest Hills,* and *Cohen.*

Accordingly, we hold that Zoning Ordinance § 59-G-2.19(c) does not violate the Establishment Clause of the First Amendment, and the judgment of the district court is therefore

REVERSED.

MURNAGHAN, Circuit Judge dissenting:

The natural tension that exists between the Establishment and Free Exercise Clauses of the First Amendment requires that delicate lines be drawn. Although I agree with the analytical approach taken by the majority, I disagree with where they have drawn the line in this case., Because I do not agree that Montgomery County Zoning Ordinance § 59-G-2.19(c) is a permissible accommodation of religion, I conclude that it violates the Establishment Clause of the First Amendment and, accordingly, I dissent.

Relying on the rationale of *Corporation of the Presiding Bishop of the Church of Jesus Christ of Latter-Day Saints v. Amos,* 483 U.S. 327, 107 S.Ct. 2862, 97 L.Ed. 2d 273

(1987), the majority concludes that Montgomery County Zoning Ordinance § 59-G-2.19(c) passes the first prong of the test laid out in *Leon v. Kurtzman*, 403 U.S. 602, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), because it has a legitimate secular purpose: to alleviate "significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335, 107 S.Ct. 2862. Specifically, the majority found that the challenged ordinance "spares Connelly School from the rigorous review of numerous subjective factors that otherwise could interfere with implementation of its mission." ([App. 11a]).

I disagree. Application of the County's special exception procedures to the Connelly School would not significantly interfere with the school's ability to define and carry out its mission. There is no danger that Montgomery County will become involved in regulating the school's *program* of religious education by simply enforcing the generally applicable zoning rules and special exception procedures at issue in this case. The special exception procedures do not burden the exercise of religion in the same way or to the same degree as did the employee hiring requirements at issue in *Amos* or the daycare program regulations at issue in *Forest Hills Early Learning Center v. Grace Baptist Church*, 846 F.2d 260 (4th Cir. 1988). There is an important difference between regulations that reach into an organization's program and personnel, on the one hand, and those that only impact the development of its physical facilities, on the other. What goes on within the walls of the church buildings is of far greater significance than the configuration of those buildings. By failing to draw a meaningful line between "significant" and "incidental" interference with religious institutions, I fear the majority is inappropriately expanding the *Amos* principle and, as a result, traveling down a path that will ultimately render the Establishment Clause meaningless.

I find further support for my conclusion that the challenged ordinance does not serve the secular purpose of avoiding governmental interference with the church's mission in the language of the ordinance itself. On its face, County Zoning Ordinance § 59-G-2.19(c) applies not only to religious schools, but also to secular schools operated on property owned or leased by religious institutions. If the ordinance were a legitimate effort to avoid interference with the mission of religious schools, it would not be written so as to extend its benefits to schools that are not engaged in any sort of religious mission. The overinclusive language of the ordinance belies the legislative purpose accepted by the majority. For both of these reasons, therefore, I conclude that County Zoning Ordinance § 59-G-2.19(c) was not enacted with the legitimate secular purpose of avoiding governmental interference with the free exercise of religion.

In *Amos*, the Supreme Court marked a path for legislative actions which relieve religious institutions from generally applicable regulatory burdens in order to better accommodate the free exercise of religion. This court followed that path in *Forest Hills* by upholding a legislative exemption in Virginia which relieves religiously affiliated daycare centers from the burdens of licensing requirements applied to secular daycare facilities. In both *Amos* and *Forest Hills*, one can easily discern a genuine effort to allow religious institutions to operate programs and thereby fulfill their missions without significant, substantive interference from the government. In this case, however, I do not see any such genuine effort. Instead, I see something that looks very much like ordinary favoritism for religious property owners in Montgomery County. Because I believe that such favoritism is precisely what the Establishment Clause forbids, I would hold that Montgomery County Zoning Ordinance § 59-G-2.19(c) is invalid.

APPENDIX B

Vincent RENZI, et al.

v.

CONNELLY SCHOOL OF THE HOLY CHILD, et al.

No. JFM-99-1512

United States District Court,
D. Maryland.

Aug.31, 1999

Vincent Renzi, Washington, D.C., for plaintiff.

William K. Wilburn, Seyfarth, Shaw, Fairwather & Geraldson, Washington, D.C., for defendant.

OPINION

Defendant, Connelly School of the Holy Child, Inc. ("Connelly School" or "the School"), operates a private religious school on a property located in Potomac, Maryland. The property is owned by a religious organization. Plaintiffs live directly across the street from the school. The School has planned and begun the implementation of a construction project that includes a new building and two new parking lots. The School has not obtained a special exception under section 59-G-2.19 of the Montgomery County Zoning Ordinance, subsection (c) of which exempts, *inter alia,* from the special exception requirement "any private educational institution, or parochial school, which is located in a building or on premises owned or leased by any church or religious organization."

Plaintiffs seek a declaratory judgment that this exemption violates the Establishment Clause of the First Amendment. They also seek an injunction prohibiting the School from proceeding with its construction project. Montgomery County has, without objection, intervened as a defendant. There are no material facts in genuine dispute, and cross-

motions for summary judgment have been filed. I find that section 59-G-2.19(c) is unconstitutional and therefore will enter summary judgment on behalf of plaintiffs.[2]

I.

The Montgomery County Code generally requires that a special exception be obtained before commencing construction of nonconforming buildings and other structures on residentially zoned land. Section 59-G-2.19(c) of the Montgomery County Zoning Ordinance provides an exemption from this requirement. It reads as follows:

> (c) Exemptions. The requirements of this section shall not apply to the use of any lot, lots or tract of land for any private educational institution, or parochial school, which is located in a building or on premises owned or leased by any church or religious organization, the government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town within Montgomery County.

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[2] In passing, the County questions plaintiffs' standing. While admitting that "plaintiffs have pled allegations that, if true, might confer standing upon them...[,] the allegations, as pled with no evidentiary support, do not suffice." Mem. of Montgomery County in Supp. of Mot. for Summ. J., at 3. There is an absence of any evidentiary recording concerning the effects of the School's proposed development of its property upon the surrounding neighborhood precisely because of the School's exempt status under section 59-G-2.19(c). Whether or not the value of plaintiffs' property will diminish if the School commences its construction plans, as plaintiffs allege, the injury they have suffered, although intangible, is very real. They have been deprived of the opportunity to participate in the public zoning hearing which would be part of the special exception process they contend the School is required to pursue. That injury clearly is more than "a mere abstract objection to unconstitutional conduct." *Suhre v. Haywood County*, 131 F.3d 1083, 1086 (4th Cir. 1997).

Section 59-G-2.19(c), in slightly different form, was first adopted almost fifty years ago. It appeared in the 1950 Montgomery County Code and read as follows:

> The requirements [of a special exception] . . . shall not apply to the use of any lot, lots, or tract of land for any private educational institution which is a parochial school or which is located in a building or on premises owned or leased by any church or religious organization, the Government of the United States, the State of Maryland or any agency thereof, Montgomery County, or any incorporated village or town within Montgomery County.

In 1966 the Maryland Court of appeals construed the language of the 1950 ordinance in a case brought by a nonreligious private school that had been denied a special exception. *See Creative Country Day Sch. of Sandy Spring, Inc. v. Montgomery County Bd. of Appeals,* 242 Md. 552, 219 A.2d 789 (1966). The court reached the somewhat strained conclusion that all "private schools which are not parochial schools are required to apply for a special exception" even if located on governmental property.[3] *Id.* at 799. The court

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[3] Although it does not clarify the court's reasoning in other respects, it is interesting to note that the Court of Appeals drew a distinction between parochial schools, that is schools attached to a particular parish, and all other private schools, presumably including religious schools, that draw their student bodies from a wider community. In making this distinction, the court stated as follows:

> A church or religious organization operating a parochial school in the community which it serves, is by its nature sensitive and responsive to the needs of the community and any hazards which the operation of the parochial school will have generally and also specially on the neighboring property owners. The attending children are generally residents in the neighborhood. It is usually financially dependent upon the good will of its adherents in the community. These considerations and the spiritual values it promotes, could lead a legislative body to conclude that the hazards involved in the operation of a school

also seemed to interpret the clause "or owned or leased by ... the Government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town with Montgomery County" as providing an exemption to public schools. This interpretation likewise seems somewhat odd since the clause was by grammatical necessity tied (through the pronoun "which") to the phrase "private educational institution."

Ten years later the Montgomery County Council effectively overruled *Creative Country Day* by adopting the language that presently appears in section 59-G-219(c). In the preamble to the amendment, the Council provided the only express legislative history that is known to exist about any portion of the section. The pertinent portion of the preamble reads as follows:

> The Council agrees that Section 59-142(c) of the Zoning Ordinance is subject to several interpretations and that it requires clarification. In *Creative County [sic] Day School vs. County Board of Appeals*, 242 Md. 552, 570, 219 A.2d 789 (1966), the Court held that while parochial schools, as accessory uses to the church, were exempt from the special exception requirements, private schools which are not parochial schools do not share the same exemption and must apply for a special exception to obtain a permit to establish such a private school. The Council is of the opinion that it would be in the public interest to modify the exemption clause of Section 59-142(c) ... to clarify that, in addition to the Court held interpreta-

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would be less likely to arise in the establishment of an accessory parochial school, than would be the case in the establishment of private schools other than parochial schools.

219 A.2d at 800. Ironically, under this distinction the Connelly School, which is not attached to a particular parish, would not have been entitled to the special exception exemption.

> tion,.... The Council feels that this modification will aid in a program for the orderly and efficient reuse of underutilized public schools.

Under the present language of the ordinance only private educational institutions, whether sectarian or nonsectarian, located on property owned or leased by a church or religious organization or on governmental property are entitled to an exemption from the special exception requirement.[4]

II.

A.

The parties agree that the test of *Lemon v. Kurtzman*, 403 U.S. 602, 612-13, 91 S.Ct. 2105, 29 L.Ed.2d 745 (1971), governs the validity of section 59-G-2.19(c) under the Establishment Clause. That test has three prongs: "[f]irst, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion . . .; finally the statute must not foster 'an excessive government entanglement with religion.'" Plaintiffs concede that section 59-G-2.19(c) meets the third of these prongs. They allege, however, that it fails under the first two.

Before focusing on the questions of whether section 59-G-2.19(c) has a secular purpose or advances religion, I will make two broad observations. The first is a truism. The constitutional policies underlying the Establishment Clause and the Free Exercise Clause are in fundamental conflict

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[4] The School contends that public schools remain covered by section 59-G-2.19(c) despite the fact that the 1976 amendment clearly was intended to make the governmental property language in the last clause applicable to all *private educational institutions*. Moreover, an exemption for public schools would seem to be unnecessary since they are not subject to zoning requirements in the first instance. *See, e.g., Glascock v. Baltimore County*, 321 Md. 118, 581 A.2d 822, 824 (1990); *Board of Child Care v. Harker*, 316 Md. 683, 561 A.2d 219, 223 (1989).

with one another. Maintenance of a creative tension between them requires both appreciation of principle and tolerance of the indefinite. It likewise requires that absolutistic logic yield to reasoned judgment. Second, the principle of neutrality, although not a talisman, expresses a constitutional value underlying both the Establishment Clause and the Free Exercise Clause. In the final analysis, it is on this principle that section 59-G-2.19(c) founders because it fails to be neutral in a context where neutrality is possible.[5] By favoring sectarian schools over most other non-profit private educational institutions, it belies any secular purpose and has a principal effect of advancing religion. Its flaw is reflected in the ease of its remedy. If the Montgomery County Council wants to save section 59-G-2.19(c), all it needs to do is extend the exemption the ordinance affords to all private non-profit schools regardless of who owns the land on which they are located.

B.

Defendants have articulated three secular purposes of section 59-G-2.19(c): (1) encouraging use of underutilized public school facilities; (2) promotion of education; and (3) alleviation of governmental interference with religion. None

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[5] The centricity of the neutrality principle is well illustrated by such cases as *Walz v. Tax Commission*, 397 U.S. 664, 90 S.Ct. 1409, 25 L.Ed.2d 697 (1970) (upholding provision of New York Constitution prohibiting legislative repeal of property tax exemption for property used for religious, educational, or charitable purposes), *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 109 S.Ct. 890, 103 L.Ed.2d 1 (1989) (finding unconstitutional a Texas exemption from state sales and use taxes for religious publications only), and *Finlator v. Powers*, 902 F.2d 1158 (4th Cir. 1990) (Striking down a North Carolina statute exempting only "Holy Bibles" from state sales tax). *See also Board of Educ. v. Grumet*, 512 U.S. 687, 704, 114 S.Ct 2481, 129 L.Ed.2d 546 (1994) ("civil power must be exercised in a manner neutral to religion"); *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983) (discussed in text, *infra*).

of these asserted purposes is sufficient to meet the first prong of the *Lemon* test. Moreover, an examination of the second and third reveal that section 59-G-2.19(c) runs afoul of the second prong of the *Lemon* test as well. I will briefly address each of the purposes suggested by defendants.

1. *Encouraging use of underutilized public school facilities*

Pointing to the legislative history of the 1976 amendment to section 59-G-2.19(c), defendants assert that a legislative purpose of the section is to encourage the use of underutilized public school facilities in Montgomery County. That is certainly true as to the 1976 amendment itself which legislatively overruled the holding of the Maryland Court of Appeals in *Creative Country Day* by extending the special exception exemption to private educational institutions located on governmental property. However, it is equally certain that this is not the purpose of the clause of section 59-G-2.19(c) challenged in this case. By its terms, that clause applies to schools located not on governmental property but on premises owned or leased by a church or other religious organization. Indeed, if the governing purpose of section 59-G-2.19(c) were to encourage the use of underutilized school facilities in Montgomery County, Connelly School – which is located on property owned by a religious organization, not on governmental property – would not be entitled to an exemption and this litigation would never have had to be instituted.

2. *Promotion of education*

Defendants next contend that second 59-G-2.19(c) has a purpose of promoting education generally. In support of that contention defendants rely heavily upon *Mueller v. Allen*, 463 U.S. 388, 103 S.Ct. 3062, 77 L.Ed.2d 721 (1983). In *Mueller* the Supreme Court upheld the constitutionality of a Minnesota statute providing an income tax deduction for tuition, textbooks, and transportation expenses of taxpayers'

dependents who attended elementary or secondary school. However, the Minnesota statute provided the tax deduction regardless of whether the dependent attended a public, sectarian, or nonsectarian school. This fact was critical to the Court's finding that the statute had a secular purpose:

> A State's decision to defray the cost of educational expenses incurred by parents-regardless of the type of schools their children attend-evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a State's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the State's citizenry is well educated. Similarly, Minnesota, like other States, could conclude that there is a strong public interest in assuring the continued financial health of private schools, *both sectarian and nonsectarian.*

463 U.S. at 395, 103 S.Ct. 3062 (emphasis added).

In contrast, in the present case section 59-G-2.19(c) exempts from the special exception requirement all private schools located on premises owned or leased by religious organizations (most of which will be religious schools) while affording the same exception to only a handful of nonsectarian private educational institutions – those located on governmental property or those located on religiously owned or leased properties. Pressed on the point during oral argument, counsel for the School stated that this discrimination is inconsequential. According to the School's argument, since religious education provides societal benefit, section 59-G-2.19(c) has a secular purpose. This statement reveals a fundamental conceptual flaw in defendants' position. The public welfare may well be benefitted by the education provided, and values instilled, by sectarian schools. However, within the parlance of Establishment Clause jurisprudence,

the proposition that a legitimate secular legislative purpose can be the promotion of religious education is an oxymoron. Likewise, by definition, to promote private religious education alone has a primary effect of advancing religion.

3. *Alleviation of governmental interference with religion*

(a)

Unquestionably, as defendants assert, avoidance of governmental interference with religion is a legitimate secular legislative purpose. See *Corporation of Presiding Bishop of Latter-day Saints v. Amos,* 483 U.S. 327, 339, 107 S.Ct. 2862, 97 L.Ed.2d 273 (1987); *Forest Hills Early Learning Ctr., Inc. v. Grace Baptist Church,* 846 F.2d 260, 263 (4th Cir. 1988). In the present case, however, it is impossible to glean from the language of section 59-G-2.19(c) that this is a purpose of the ordinance. Section 59-G-2.19(c) does not exempt only sectarian private educational institutions from the requirement of obtaining a special exception. Rather, it affords the exemption to any private educational institution – whether sectarian or nonsectarian –"located in a building or on premises owned or leased by any church or religious organization." Under the definition contained in Article 59-G-2.19(c)-A of the Montgomery County Zoning Ordinance, "private educational institutions" include technical and trade schools.

Of course, in the vast majority of cases it is a sectarian school providing traditional elementary and secondary school education that would be located on property owned or leased by a religious organization. However, under the terms of the ordinance, a religious organization could, for the purpose of obtaining income to support its religious purposes, lease property to a nonsectarian private educational institution, even one operated for profit, which could construct facilities on the property without obtaining a special exception. Zoning regulation of such a school would provide no risk whatsoever of governmental interference with religious af-

fairs, particularly if the school provided solely skills training, e.g., a school for beauticians or automobile mechanics. Thus, a legislative intent to alleviate such interference cannot be attributed to the Montgomery County Council from the language of the ordinance itself.[6]

Moreover, even if the alleviation of governmental interference with religion were deemed to be the secular purpose of section 59-G-2.19(c), that purpose would be constitutionally insufficient. Under *Amos* it must be *significant* governmental interference that the statute is intended to alleviate. 483 U.S. at 339, 107 S. Ct. 2862. Cases such as *Forest Hills Learning Center, Inc. v. Grace Baptist Church,* 846 F.2d 260 (4th Cir. 1988), and *Cohen v. City of Des Plaines,* 8 F.3d 484 (7th Cir. 1993), upon which defendants rely, are quite different from the present case. They involved exempting church-related nursery schools and child care centers from, respec-

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[6] Nor have the parties, after diligent effort, been able to find any legislative history reflecting such an intent. This is not surprising since the predecessor to section 59-G-2.19(c) was first enacted almost fifty years ago at a time when Establishment Clause jurisprudence had not developed to a stage where a legislative body would have been likely to conceive of founding an ordinance on the constitutional basis that it avoided governmental interference with religion. To the contrary, as a matter of historical fact, it is far more probable that the Montgomery County Council originally exempted parochial schools from the special exception requirement because of the general deference then paid to religious institutions and because of the not unreasonable belief that such schools were subject to non-regulatory social constraints that were likely to make them good neighbors. *See Creative Country Day,* 219 A.2d at 800 (language quoted in footnote 2, *supra*).

I am not suggesting that it is necessary to find that a legislature specifically contemplated a legitimate secular purpose when it enacted a statute challenged under the Establishment Clause. A statute can be held constitutional on the basis of a "contemporary," i.e., present, secular purpose whether or not there is evidence that the legislature conceived that purpose. *See Koenick v. Felton,* 190 F.3d 259 (4th Cir. 1999). However, this does not mean that a legislative purpose can be hypothesized which is inconsistent with the statutory language.

tively, a city zoning ordinance and state licensing laws. The court in each case found that regulating the activity of child care posed a significant risk of entangling the government in religious affairs. Here, defendants do not contend that there is any danger that Montgomery County will become entangled in regulating the activity of religious education. Requiring the School to obtain a special exception would merely subject its use of the property to such basis zoning considerations as constructing facilities generally harmonious with the neighborhood and preventing excessive traffic congestion.

Defendants argue that these two consideration themselves pose a threat of governmental interference in religious affairs. Montgomery County suggests that architectural review requirements theoretically could be used by a zoning board to block construction of facilities by an unpopular religion. At the same time, however, both the County and the School quickly disavow any history or reasonable foreseeability that zoning boards in the County have abused, or will abuse, their authority in this respect. Therefore, this hypothesized secular legislative purpose is wholly conjectural and does not relate to any identified risk of "significant" governmental interference with religious affairs.[7] If the constitutionality of a statute could be upheld on such a thin reed,

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[7] *Boyajian v. Gatzunis*, No. 98-11763-DPW (D. Mass. May 24, 1999) is distinguishable precisely on the ground that the ordinance there in question had originally been enacted to remedy an instance of discrimination against a religious organization. Moreover, the ordinance has been amended over the years to include protection "for a number of nonreligious uses – agriculture, child care facilities, group homes for disabled persons, and solar energy systems – as well." Slip op. at 8.

I also note that to the extent there is a potential risk of discrimination against non-traditional religious groups, e.g., ones perceived as "cults," Section 59-G-2.19(c) does not itself necessarily provide an effective remedy. It merely changes the landscape on which potential litigation might proceed, leaving for judicial interpretation what constitutes a "church or religious organization."

legislative bodies dominated by religious groups could run roughshod over the Establishment clause.[8]

The School, in contrast, has focused not on the alleged danger of interference posed by the power of architectural review but what it perceives as the potentially inhibiting effect of density requirements upon its use of its property. It cites *Keeler v. Mayor of Cumberland,* 940 F. Supp. 879 (D. Md. 1996), which factually presents the converse of the situation presented here. In *Keeler,* rather than attempting to build a new facility, a church wanted to tear down what it considered to be a "dilapidated building," but was unsuccessful in its efforts to obtain a permit to do so under a municipal historic preservation ordinance. The court held that the ordinance violated the Free Exercise Clause because it prevented the church from using its assets as it deemed appropriate to further its religious mission. Specifically, the church's position – upheld by the court – was that its razing of the existing building was "the cornerstone of the Parish's plans to improve worship at the Parish, to increase accessibility to worship and other religious services for the handicapped, elderly and other parishioners, and to use its property as an expression of religious belief." *Id.* at 883.

Both the nature of the ordinance in question and the underlying factual context are substantially different in the present case. It is one thing for a legislative body to impose regulatory controls that prevent a religious organization from using its property in reasonable fulfillment of its religious

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[8] In a similar vein, the County's suggestion during oral argument that if religious property owners abuse their exempt status accorded by Section 59-G-2.19(c), County residents can seek relief from the County Council misses the mark. One of the very purposes of the Establishment Clause is a place constitutional restraints upon legislatures' power to enact in the first instance ordinances and other statutes serving sectarian ends, even if preferred by a majority of citizens (or at least a majority of politically organized citizens).

goals. It is quite another to say that because a theoretical danger exists that a zoning board might abuse its power, a legislative body can exempt sectarian organizations, and sectarian organizations alone, from general restraints on property use. If the Montgomery County Zoning Board were to abuse its power in failing to grant a special exception to a sectarian school, the school could file suit, just as did the church in *Keeler,* to obtain relief under the Free Exercise Clause. But that does not mean that the school, unlike other users of land, may be freed to do whatever it may choose on its property regardless of such basic considerations as traffic congestion and other density concerns.

(b)

The School's contention that only schools located on property owned or leased by religious organizations may be exempted from density requirements also implicates the second prong of *Lemon* test. By emphasizing the need for it to develop its property without being subject to the constraints of density requirement in order to fulfill its religious mission, the School demonstrates why the exemption afforded by section 59-G-2.19(c) has a principal effect of advancing religion.

It is a stark reality of private elementary and secondary education that tuition rates, which have spiraled upward in recent years, can no longer continue their rate of upward climb. However, the cost of education, including faculty salaries, financial aid (necessary to maintain a diverse student body), construction of facilities, and purchase of equipment continues to soar. For years many private schools have dealt with this problem by increasing the size of their student bodies (essentially surviving on the financial margin each additional tuition brings). They now confront the problem of having reached the physical limitations of their campuses. If sectarian schools, exempted from zoning restrictions, could construct high-rise facilities to accommodate

new students but non-profit nonsectarian private schools could not do so, the viability of the latter inevitably would be brought into question.[9]

I do not suggest there is any evidence in the record that Connelly School presently intends to construct a high-rise building or otherwise develop the property on which it is located in a manner that would result in undue traffic congestion or other density problems. However, if the School is taken at its words, it needs the exemption in order to maintain the freedom to enlarge its facilities to whatever extent it concludes its religious mission requires. To confer that freedom upon it, but not upon non-profit nonsectarian private educational institutions as well, would destroy the delicate balance between religious and non-religious institutions required by the Establishment Clause.

Several particular issues concerning certain construction that has proceeded in recent weeks by agreement of the parties remain to be decided. I will therefore defer entering an order implementing this opinion until I have had the opportunity to confer with counsel.

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[9] I recognize that in *Cohen v. City of Des Plaines* the Seventh Circuit (unlike the district court) found unpersuasive similar concerns raised by the owner of a for-profit day care business regarding the anti-competitive effects of exempting nursery schools operated on church property from the requirement of obtaining a special exception. 8 F.3d 484, 492-93 (7th Cir. 1993). Assuming the correctness of the Seventh Circuit's view, there is a self-evident distinction between discriminating in favor of church nursery schools over for-profit businesses and discriminating in favor of sectarian elementary and secondary schools over non-profit nonsectarian elementary and secondary schools. Although the care of children during their preschool years certainly involves some teaching of values, favoring sectarian over nonsectarian institutions that provide education at the elementary and secondary school level obviously would have a greater effect of advancing religion.

ORDER

For the reasons stated in the memorandum entered on August 31, 1999, it is, this 2nd day of September, 1999

ORDERED that

1. Defendant Montgomery County's motion for summary judgment is denied;

2. Defendant Connelly School of the Holy Child's motion for summary judgment is denied;

3. Plaintiffs' motion for summary judgment is granted;

4. Montgomery County Zoning Ordinance § 59-G-2.19(c) is declared to be violative of the Establishment Clause of the First Amendment to the United States Constitution;

5. Defendant Connelly School of the Holy Child is enjoined from engaging in any further construction except completion of paving the parking lot in the rear of the School and completion of the sediment control pond in the rear of the School; and

6. Defendant Connelly School of the Holy Child may maintain the gravel turnaround area in the front of the School until further Order of this Court.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

FILED
September 8, 2000

No. 99-2352
CA-99-1512-JFM

BIRGIT EHLERS-RENZI; VINCENT RENZI
Plaintiffs – Appellees

v.

CONNELLY SCHOOL OF THE HOLY CHILD, INCORPORATED
Defendant – Appellant

THE AMERICAN JEWISH CONGRESS; THE BECKET FUND FOR RELIGIOUS LIBERTY; THE CONVENTION OF THE PROTESTANT EPISCOPAL CHURCH OF THE DIOCESE OF WASHINGTON; GENERAL CONFERENCE CORPORATION OF SEVENTH-DAY ADVENTISTS; NATIONAL JEWISH COMMISSION ON LAW AND PUBLIC POLICY; THE ROMAN CATHOLIC ARCHDIOCESE OF WASHING; UNION OF ORTHODOX JEWISH CONGREGATION OF AMERICA AMERICAN CIVIL LIBERTIES UNION OF MARYLAND; AMERICAN CIVIL LIBERTIES UNION OF THE NATIONAL CAPITAL AREA
Amici Curiae

On Petition for Rehearing and
Rehearing En Banc

The appellees' petition for rehearing and rehearing en banc was submitted to this Court. As no member of this Court or the panel requested a poll on the petition for rehearing en banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and rehearing en banc is denied.

For the Court,

/s/ Patricia S. Connor

_____

CLERK

APPENDIX D

Selected Provisions of Montgomery County Zoning Ordinance

59-G-1.21. General conditions.

(a) A special exception may be granted when the Board, the Hearing Examiner, or the District Council, as the case may be, finds from a preponderance of the evidence of record that the proposed use:

(1) Is a permissible special exception in the zone.

(2) Complies with the standards and requirements set forth for the use in Division 59-G-2. The fact that a proposed use complies with all specific standards and requirements to grant a special exception does not create a presumption that the use is compatible with nearby properties and, in itself, is not sufficient to require a special exception to be granted.

(3) Will be consistent with the general plan for the physical development of the District, including any master plan adopted by the commission. Any decision to grant or deny special exception must be consistent with any recommendation in an approved and adopted master plan regarding the appropriateness of a special exception at a particular location. If the Planning Board or the Board's technical staff in its report on a special exception concludes that granting a particular special exception at a particular location would be inconsistent with the land use objectives of the applicable master plan, a decision to grant the special exception must include specific findings as to master plan consistency.

(4) Will be in harmony with the general character of the neighborhood considering population density, design, scale and bulk of any proposed new structures, intensity and character of activity, traffic and parking conditions and number of similar uses.

(5) Will not be detrimental to the use, peaceful enjoyment, economic value or development of surrounding properties or the general neighborhood at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

(6) Will cause no objectionable noise, vibrations, fumes, odors, dust, illumination, glare, or physical activity at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

(7) Will not, when evaluated in conjunction with existing and approved special exceptions in any neighboring one-family residential area, increase the number, intensity, or scope of special exception uses sufficiently to affect the area adversely or alter the predominantly residential nature of the area. Special exception uses that are consistent with the recommendations of a master or sector plan do not alter the nature of an area.

(8) Will not adversely affect the health, safety, security, morals or general welfare of residents, visitors or workers in the area at the subject site, irrespective of any adverse effects the use might have if established elsewhere in the zone.

(9) Will be served by adequate public services and facilities including schools, police and fire protection, water, sanitary sewer, public roads, storm drainage and other public facilities.

(i) If the special exception use requires approval of a preliminary plan of subdivision the adequacy of public facilities must be determined by the Planning Board at the time of subdivision review. In that case, subdivision approval must be included as a condition of the special exception.

(ii) With regard to findings relating to public roads, the Board, the Hearing Examiner, or the District Council, as the case may be, must further determine that the proposal

will have no detrimental effect on the safety of vehicular or pedestrian traffic.

(b) Nothing in this Article relieves an applicant from complying with all requirements to obtain a building permit or any other authorization or approval required by law, nor does the Board's finding of facts regarding public facilities bind any other governmental agency or department responsible for making a determination relevant to the authorization, approval or licensing of the project.

(c) The applicant for a special exception has the burden of proof to show that the proposed use satisfies all applicable general and specific standards under this Article. This burden includes the burden of going forward with the evidence, and the burden of persuasion on all questions of fact.

* * * *

Sec. 59-G-2.19. Educational institutions, private.

(a) **Generally.** A lot, tract or parcel of land may be allowed to be used for a private educational institution upon a finding by the board:

(1) That such use will not constitute a nuisance because of traffic, number of students, noise, type of physical activity or any other element which is incompatible with the environment and character of the surrounding neighborhood; and

(2) That, except for buildings and additions thereto completed, or for which building permits have been obtained prior to the time of adoption of this section, such use will be housed in buildings architecturally compatible with other buildings in the surrounding neighborhood, and, in the event such building is to be located on a lot, tract or parcel of land of 2 acres or less, in either an undeveloped area or an area substantially developed with single-family homes, that the exterior architecture of such building will be of a residential

home design, and at least comparable to existing residential homes, if any, in the immediate neighborhood; and

(3) That such use will not, in and of itself or in combination with other existing uses, affect adversely or change the present character or future development of the surrounding residential community; and

(4) That such use can and will be developed in conformity with the following area, density, building coverage, frontage, setback, access and screening requirements, where specified:

a. **Area, frontage and setback**—As shall be specified in a site plan of development approved by the board; provided, that in no event shall such standards be less than the area regulations for the zone in which the private educational institution is proposed to be located; and

b. **Access building coverage and screening**—As shall be specified in a site plan of development approved by the board; and

c. **Density**—Such density, being the allowable number of pupils per acre permitted to occupy the premises at any one time as shall be specified by the board upon consideration of the following factors:

1. Traffic patterns, including:

a) Impact of increased traffic on residential streets;

b) Existence of arterial highways; and

2. Noise or type of physical activity; and

3. Character, percentage and density of existing development and zoning within the community; and

4. Topography of the land to be used for the special exception:

5. Provided that a density in excess of 87 pupils per acre may only be permitted upon a finding that (a) the program of instruction, special characteristics of students, or other circumstances justify reduced space and facility requirements; and (b) the additional density will not adversely affect adjacent properties; (c) additional traffic generated by the additional density will not adversely affect the surrounding streets; and (d) adequate provisions for drop-off and pick-up of students will be provided.

(b) **Site plan.**

(1) In addition to submitting such other information as may be required, an applicant shall submit with his application a site plan of proposed development. Such plan shall show the size and shape of the subject property, the location thereon of all buildings and structures, the area devoted to parking and recreation facilities, all access roads and drives, the topography and existing major vegetation features, the proposed grading, landscaping and screening plans and such other features necessary for the evaluation of the plan.

(2) No special exception, building permit or certificate of occupancy shall be granted or issued except in accordance with a site plan of development approved by the board. In reviewing a proposed site plan of development the board may condition its approval thereof on such amendments to the plan as shall be determined necessary by the board to assure a compatible development which will have no adverse effect on the surrounding community, and which will meet all requirements of this chapter. Any departure from a site plan of development as finally approved by the board shall be cause for revocation of the special exception, building permit or certificate of occupancy, in the manner provided by law.

(c) **Exemptions.** The requirements of this section shall not apply to the use of any lot, lots or tract of land for any private educational institution, or parochial school, which is

located in a building or on premises owned or leased by any church or religious organization, the government of the United States, the State of Maryland or any agency thereof, Montgomery County or any incorporated village or town within Montgomery County.

(d) **Nonconforming uses.** Nothing in this chapter shall prevent any existing private educational institution which obtained a special exception prior to the effective date of this chapter, from continuing its use to the full extent authorized under the resolution granting the respective special exception, subject, however, to division 59-G-4 of this chapter.

(e) **Public Buildings.**

(1) A special exception is not required for any private educational institution that is located in a building or on premises that have been used for a public school or that are owned or leased by Montgomery County.

(2) However, site plan review under Division 59-D-3 is required for:

(i) construction of a private educational institution on vacant land owned or leased by Montgomery County; or

(ii) any cumulative increase that is greater than 15% or 7,500 square feet, whichever is less, in the gross floor area, as it existed on February 1, 2000, of a private educational institution located in a building that has been used for a public school or that is owned or leased by Montgomery County. Site plan review is not required for: (i) an increase in floor area of a private educational institution located in a building that has been used for a public school or that is owned or leased by Montgomery County if a request for review under mandatory referral was submitted to the Planning Board on or before February 1, 2000, or (ii) any portable classroom used by a private educational institution that is located on property owned or leased by Montgomery County and that is in place for less than one year.

Supreme Court, U.S.
FILED
JAN 25 2001
OFFICE OF THE CLERK

(2)

No. 00-1118

IN THE

Supreme Court of the United States

VINCENT RENZI, *ET AL.*,

Petitioners,

v.

CONNELLY SCHOOL OF THE HOLY CHILD, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

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27PP

QUESTION PRESENTED

Whether the court below correctly applied to the particular facts before it the analytic approach for assessing legislative accommodation for religious exercise set forth by this Court in *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327 (1987).

RULE 29.6 STATEMENT

Respondent Connelly School of the Holy Child, Inc., is owned and operated by the Society of the Holy Child Jesus, Inc., a religious order operated under the auspices of the Roman Catholic Church. It has no other parent organizations and no subsidiaries or affiliates.

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IN THE

Supreme Court of the United States

No. 00-1118

VINCENT RENZI, *ET AL.*,

Petitioners,

v.

CONNELLY SCHOOL OF THE HOLY CHILD, INC.,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF IN OPPOSITION

This litigation concerns an effort by a religious school to undertake a construction project determined to be necessary to the religious mission of the school. The project involves the replacement of an old building and two temporary trailers with a new building. The new building would be fully subject to local zoning and building code requirements, but an exemption under local law for schools on premises owned by a religious organization allowed the school to forego the "special exception" process that would otherwise be required before it could undertake the project. One neighboring couple challenged the exemption as a violation of the Establishment Clause. The Fourth Circuit rejected that contention, and the present petition followed.

The petition should be denied. The decision below does not conflict with any of this Court's precedents. As the Court of Appeals explained, it "plow[ed] no new ground" in concluding that the provision at issue was a legitimate effort to accommodate religious exercise. Pet. App. 17a. Nor does the decision below conflict with any other court of appeals or state court decision. Indeed, the section of the petition purporting to describe such a conflict cites only decisions that came out the *same way* as the decision below—upholding a legislative accommodation of religious exercise in the face of an Establishment Clause challenge. *See* Pet. 18-23. Petitioners make much of the dissent below, but—as they neglect to mention—the dissenting judge expressly "agree[d] with the analytical approach taken by the majority," and disagreed only with "where they have drawn the line in this case." Pet. App. 17a. Such disagreement over a purported "misapplication of a properly stated rule of law" is not grounds for granting certiorari. S. Ct. Rule 10.

As they did below, petitioners focus their claim before this Court not on their own factual situation but on the hypothetical application of the statute to others in a quite different factual context. *See* Pet. 3, 4, 9, 10-11. The court below held that petitioners lack standing to raise such claims, Pet. App. 12a-13a—a ruling petitioners do not even address in their petition—and that the hypothetical applications on which petitioners rely were only "remote" possibilities in any event. *Id.* 13a. Petitioners also raise contentions before this Court that were not raised below, and totally neglect to mention that Congress recently enacted comprehensive legislation addressing the questions presented. The Court this very month denied a petition that the petitioners here acknowledge raised questions "largely similar" to their own, Pet. 19 n.7, and this petition should meet the same fate.

STATEMENT OF THE CASE

In an apparent effort to minimize the burden on the exercise of religion that the exemption at issue legitimately alleviates, the petition does not accurately convey the intrusiveness of the special exception process to which religiously-affiliated schools would otherwise be subject in the absence of the exemption. That process entails:

- The submission of detailed plans by the school to the County Board of Appeals;
- Public hearings at which residents or other interested members of the public may appear and testify concerning the school's plans;
- A supermajority vote of four of the five Board members finding that a variety of subjective criteria have been satisfied before the plans can be approved;
- The imposition of what petitioners themselves describe as "numerous restrictions on the special exception applicant," Ct. App. J.A. 11 (Complaint ¶ 9); and
- Annual inspections by County officials to check for compliance with such restrictions. [*See* Zoning Ordinance § 59-G-2.19, 1.3(a); Pet. App. 4a-5a.]

An appreciation of the scope and intrusiveness of the special exception process—not adequately conveyed by the petition's statement of facts—is essential to understand the conclusion of the court below that the challenged exemption from that process "spares Connelly School from the rigorous review of numerous subjective factors that otherwise could interfere with implementation of its mission," "relieves Connelly School from having to justify its religious or religion-related needs before civil authorities and convince those authorities that the school's renovations and additions satisfy * * * subjective requirements," and "extricates Montgomery County from the resolution of disputes that could have a religious underpinning." Pet. App. 11a.

At the same time, the petition exaggerates the potential impact of the exemption on others by failing to note that while it exempts religiously-affiliated schools from the special exception regime, it does not relieve them from other requirements of the Montgomery County code. This includes zoning and building code requirements concerning such matters as building height, parking, areage, frontage, and setback, as well as environmental, water and sewage, signage, fire, safety, and health regulations. *See* Ordinance § 59-G-2.19(a)(4); Ct. App. J.A. 519. Petitioners' contention that "the exemption allows the School to construct a very large building that would significantly change the character of the neighborhood," Pet. 5, like the district court's concern that the School could "construct a high-rise building," Pet. App. 33a, is thus wholly unfounded. The height of the new building (43 feet) is comfortably under the 50-foot height limit that applies to all buildings in the neighborhood, Ct. App. J.A. 551, and the architectural "footprint" of the building on the ten-acre site is only 10,000 square feet. *Id.* at 753, 755.

The petition also misstates the manner in which the School has in fact proceeded in this case. The record is clear that the School has acted throughout with sensitivity to the concerns of its neighbors: it initiated consultation meetings with the neighbors, replaced its initial architect when that architect's proposals were determined to be out of character with the neighborhood, agreed to add more landscaping and to alter the design of the parking lot lighting in response to neighbors' suggestions, and retained a traffic engineering consultant to ensure minimal impact on traffic flow. *Id.* at 550, 553, 755-757. The record thus refutes the petition's claim—made without citation—that the School "refused to make any changes to its construction plans in response to the neighbors' concerns." Pet. 5. In that regard, it is noteworthy that the present litigation was brought only by one neighboring couple.

The petition's description of the decision below is also deficient in two significant respects. First, the petition neglects even to mention that the Court of Appeals concluded that the Renzis lacked standing to complain about the possibility that the exemption might be invoked by a secular entity operating on land owned by a religious group—the same hypothetical featured in their petition before this Court. *See* Pet. 3, 4, 9, 10-11. As the Court of Appeals noted, the Renzis' argument was based upon "conjur[ing] up hypotheticals involving use of the exemption by secular entities * * * that operate on land owned by a church." Pet. App. 12a. The problem with this line of attack, as the court below pointed out, is that there is no dispute that the hypotheticals do not remotely describe the present situation—"we do not have before us any of the hypothetical situations advanced by the Renzis." *Id.* 12a-13a.

This is significant because petitioners' "standing derives from their status as neighbors challenging the particular improvements and additions being constructed by * * * a religious school operated on property owned by a religious organization." *Id.* 13a. And, as the court below explained, "[t]he 'traditional rule' is that one 'to whom a statute may constitutionally be applied may not challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.' " *Id.* (quoting *Los Angeles Police Dep't* v. *United Reported Publ'g Corp.*, 528 U.S. 32, 38 (1999)).

Petitioners simply do not address this independent and alternative ground on which the court below rejected their central argument. *See* Pet. App. 12a (finding that petitioners' "argument fails on two levels"). They do not even note it in their description of the decision below. *See* Pet. 7-9.

The second significant respect in which petitioners' description of the opinions below is deficient is in their description of the dissent. Though they quote much of it,

petitioners leave out what for certiorari purposes is the most pertinent part: the dissenting judge's statement at the outset of his opinion that "I *agree* with the analytical approach taken by the majority," disagreeing only "with where they have drawn the line in this case." *Id.* 17a (Murnaghan, J., dissenting) (emphasis added). In other words, the dissent's disagreement is over application to the particular facts of an agreed-upon analytical approach. This Court's rules make clear that such disagreement is not a basis for certiorari. *See* S. Ct. Rule 10.

REASONS FOR DENYING THE WRIT

I. THERE IS NO CONFLICT WITH THIS COURT'S CASES.

1. Petitioners begin their argument by contending that the decision below conflicts with this Court's decisions governing accommodation of religious exercise. They are quite wrong. As this Court has emphasized, "[t]here is ample room under the Establishment Clause for benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference." *Corporation of Presiding Bishop of Church of Jesus Christ of Latter-Day Saints* v. *Amos*, 483 U.S. 327, 334 (1987) (quotation omitted). Indeed, the Court has taken pains to emphasize that "the Constitution allows the State to accommodate religious needs by alleviating special burdens" on religion. *Board of Educ. of Kiryas Joel Village Sch. Dist.* v. *Grumet*, 512 U.S. 687, 705 (1994). *See Employment Div., Dep't of Human Res.* v. *Smith*, 494 U.S. 872, 890 (1990) ("nondiscriminatory religious-practice exemption[s]" from generally applicable laws are not only "permitted" but often "desirable"); *Amos*, 483 U.S. at 334 (" 'This Court has long recognized that the government may (and sometimes must) accommodate religious practices and that it may do so without violating the Establishment Clause.' ") (quoting *Hobbie* v. *Unemployment Appeals Comm'n of Fla.*, 480 U.S. 136, 144-145 (1987)); *Lynch* v. *Donnelly*, 465 U.S. 668, 673 (1984) ("[T]he Con-

stitution * * * affirmatively mandates accommodation, not merely tolerance, of all religions * * * . Anything less would require the 'callous indifference' we have said was never intended by the Establishment Clause.") (citations and quotations omitted).

Although petitioners allege that the decision below conflicts with this Court's cases, they recognize that "under appropriate circumstances exemptions for religious practices from laws that impose serious burdens on those practices * * * are desirable and ought to be encouraged," and that "this Court's precedents authorize religious exemptions * * * where the exemption * * * alleviates a significant burden on religious exercise." Pet. 29, 13. That is precisely the governing test articulated and applied by the Court of Appeals below. *See, e.g.*, Pet. App. 11a (noting this Court's holding in *Amos* that "the exemption served a permissible secular purpose because it 'alleviate[d] significant governmental interference with the ability of religious organizations to define and carry out their religious missions,' " and concluding that "[t]his same reasoning applies to the exemption contained in Zoning Ordinance § 59-G-2.19(c)") (quoting *Amos*, 483 U.S. at 335). Petitioners' disagreement, therefore, is with the application by the court below of the test set forth by this Court in *Amos*, not with the test or approach adopted by the lower court. *See* Pet. App. 17a (noting that the conclusion that the exemption is constitutional "follows ineluctably from the holding[] in *Amos*"); *see also id.* (Murnaghan, J., dissenting) ("I agree with the analytical approach taken by the majority").

This Court's rules make clear that such disagreement does not warrant granting the writ. *See* S. Ct. Rule 10 ("A petition for certiorari is rarely granted when the asserted error consists of * * * the misapplication of a properly stated rule of law."). At bottom, petitioners' objection is that the burden on religious exercise alleviated by the exemption is not properly regarded as significant in this particular instance.

The court below, however, detailed at some length how the "rigorous" and "subjective" special exception process to which the school would otherwise be subjected would constitute a significant burden on the religious mission of the school. Pet. App. 11a.

More generally, the extent to which application of land use regulations to religiously-affiliated entities can impede religious exercise has been amply documented.[1] The seriousness of the problem led Congress to pass the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (Sept. 22, 2000), to address "frequently occurring burdens on religious liberty" in the land use context. 146 Cong. Rec. S7774 (July 27, 2000) (Joint Statement of Sens. Hatch and Kennedy). The Act was based on "three years of hearings" that "compiled massive evidence that [the] right [to build, buy, or rent space for religious assembly] is frequently violated" and "much

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[1] *See, e.g.*, *Boyajian* v. *Gatzunis*, 212 F.3d 1, 8 (1st Cir. 2000) (citing evidence of "numerous instances of zoning actions that reflect local sentiments ranging from outright hostility to indifference to the needs of religious organizations"), *cert. denied*, 69 U.S.L.W. 3455 (Jan. 8, 2001); Von G. Keetch & Matthew K. Richards, *The Need for Legislation to Enshrine Free Exercise in the Land Use Context*, 32 U.C. Davis L. Rev. 725, 726, 731 (1999) (study documenting that "religions are significantly disadvantaged in seeking land use accommodations as they deal with so called 'generally applicable' and 'neutral' laws" and that "ignorance and even hostility toward religion sometimes operate behind the facade of ostensibly neutral land use regulations"); Douglas Laycock, *State RFRAs and Land Use Regulation*, 32 U.C. Davis L. Rev. 755, 783 (1999) ("Land use regulation has become the most widespread obstacle to the free exercise of religion."); Helen M. Maher, *Religious Freedom and Zoning*, 5 Buff. Envtl. L.J. 309, 310 (1998) ("The conflict between religious freedom and government regulation is often witnessed in the clash between religious uses of property and zoning ordinances that regulate those property uses").

evidence that * * * [religious] discrimination [in land use regulation is] very widespread." *Id.* at S7774-75. *See infra* 17-19. Petitioners may disagree with the lower court's finding that the exemption served the legitimate purpose of alleviating a *significant* burden on the religious mission of the Connelly School, Pet. App. 11a, but that conclusion was amply supported, and any such disagreement plainly does not warrant certiorari.

The petition relies most heavily on the plurality opinion in *Texas Monthly, Inc.* v. *Bullock*, 489 U.S. 1 (1989), and criticizes the Court of Appeals' opinion below for neither discussing nor citing that opinion. Pet. 16. Not even the dissent below cited *Texas Monthly*, however, for the simple reason that the case offers no support for petitioners' contentions.

As respondent explained below, the tax exemption for religious periodicals in *Texas Monthly* differed in at least two critical respects from the regulatory exemption at issue here and in *Amos*: *first*, it required nonbeneficiaries to subsidize religion, "increasing their tax bills by whatever amount is needed to offset the benefit bestowed on subscribers to religious publications;" *second*, it did not "prevent[] potentially serious encroachments on protected religious freedoms." *Texas Monthly*, 489 U.S. at 18 n.8. As the plurality in *Texas Monthly* confirmed, that decision "in no way" signaled a departure from *Amos*. *Id.*

2. As noted, the core of petitioners' objection is a complaint that the court below concluded they had no standing to raise. Pet. App. 13a. Petitioners' argument that the exemption at issue does not relieve a significant burden on religious exercise depends upon the hypothetical possibility that it might be applied in the case of a secular school, so that the exemption is a "naked preference for religious landlords over nonreligious landlords." Pet. 11. As the court below explained, no such hypothetical case was before the court, and

the " 'traditional rule' is that one 'to whom a statute may constitutionally be applied may not challenge the statute on the ground that it may conceivably be applied unconstitutionally to others in situations not before the court.' " Pet. App. 13a (quoting *Los Angeles Police Dep't*, 528 U.S. at 38).

The application of this "traditional rule" in this case precludes consideration of the central complaint the Renzis raised below and seek to bring before this Court. Although petitioners went so far as to argue below that "the actual use of the exemption today is irrelevant," Ct. App. Br. 46, this Court has explained that the rule it reiterated as recently as *Los Angeles Police Department* "reflects * * * the prudential limitations on constitutional adjudication," and limits judicial review to "flesh and blood legal problems." *Los Angeles Police Dep't*, 528 U.S. at 39 (quotations omitted). *See Seling* v. *Young*, S. Ct. No. 99-1185, slip op. at 13 (Jan. 17, 2001) (court of appeals "addressed only respondent's individual case, and we do not decide claims that are not presented by the decision below"); *Bowen* v. *Kendrick*, 487 U.S. 589, 612 (1988) ("It has not been the Court's practice * * * to strike [statutes] down in anticipation that particular applications may result in unconstitutional results"); *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 501 (1985) ("two of the cardinal rules governing the federal courts" are "never to anticipate a question of constitutional law in advance of the necessity of deciding it" and "never to formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied") (quotation omitted).

This Court would not be able to address petitioners' central argument on the merits without first addressing and overturning the ruling below that petitioners are not suitable parties to raise that argument. Yet petitioners make no effort to respond to the Court of Appeals' ruling in that regard, do not include a "Question Presented" addressing that ruling, and do not suggest that anything about that ruling is remotely certworthy.

The court below went on to explain that "the possibility that the exemption would be applied in a completely areligious setting is remote." Pet. App. 13a.[2] Indeed, petitioners' contention that the exemption was enacted simply to benefit "religious landowners" is seriously undercut by the fact that the exemption is only given to churches or religious organizations that allow their buildings or premises to be used for *education*. If the County in fact acted out of the "religious favoritism" plaintiffs have attributed to it, it surely would have established a much broader exception—one exempting religious landowners from zoning controls for any number of uses, including commercial uses. Instead, the County did what makes perfect sense if it were seeking to avoid government interference with the exercise of religion—carved out an exemption for churches and religious organizations using their property for education.

One of the oldest and most traditional ways in which religious groups—including the Roman Catholic Church—have pursued their mission is through education. In light of this tradition and practice, it would have been perfectly understandable for the County to presume that a "private educational institution, or parochial school, * * * located in a building or on premises owned or leased by any church or religious organization"—the language of the exemption—would share and promote the religious mission of the religious owner. *See Price Waterhouse* v. *Hopkins*, 490 U.S. 228, 241 (1989) ("We need not leave our common sense at the doorstep when we interpret a statute.").

The fact that Section 59-G-2.19(c) *conceivably* might extend to a secular school located on property controlled by a

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[2] A typographical error in petitioners' appendix and the Federal Reporter—or an over-zealous spell-check program—changes "areligious" to "religious" in this quotation. It is "areligious" in the slip opinion issued by the Fourth Circuit, which is plainly correct in context.

church or religious organization does not establish an improper purpose. Petitioners offer no evidence that the exemption was intended to cover the implausible types of schools they have hypothesized, *see* Ct. App. Br. 6-7, and, as discussed, it was perfectly reasonable for the County to assume that all (or virtually all) the schools covered by Section 59-G-2.19(c) would share the same religious mission as the church or other religious institution controlling the premises on which they are located. Indeed, even the District Court recognized this would be true in the "vast majority of cases." Pet. App. 28a. [3]

Moreover, if the County *had* stopped to think about the exemption's *potential* application to a secular school, it might well have recognized that remedying the alleged drafting flaw asserted by plaintiffs—*i.e.*, that the exemption does not specifically "require that a school be religiously-affiliated," Ct. App. Br. 13—would create more Establishment Clause problems than it would solve. *Cohen* v. *City of Des Plaines*, 8 F.3d 484, 490 (7th Cir. 1993), *cert. denied*, 512 U.S. 1236 (1994), illustrates the point. Like plaintiffs here, the plaintiff in that case "challenge[d]" the City's asserted accommodation purpose for the exemption, arguing

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[3] While a common sense construction is all that is needed to reach the conclusion that schools seeking the exemption are far more likely to resemble the religious school defendant in this case than the hypotheticals conjured up by plaintiffs, the record also supports this conclusion. *See* Ct. App. J.A. 519-520. In any event, to be clear, even if there existed in Montgomery County a secular school (or even handful of schools) located on religious property that might fall within the literal reach of the exemption *and* be allowed to invoke the exemption by the County—issues not presented on the facts of this case—any such school would obviously be the exception to the rule. And construing the exemption in light of that hypothetical exception would not only defy common sense but flout the "traditional rule" of constitutional adjudication. *See supra* 9-10.

that the " 'City's exemption applies to all day care centers in church buildings regardless of whether they teach religion at all.' " *Id.* at 490 (quoting district court). The Seventh Circuit rejected this argument:

> [W]e are wary of holding that the Des Plaines' ordinance would pass muster under *Lemon*'s purpose requirement only if it stated that nursery school and day care center activities must be "religious" in nature. * * * [I]t is not up to legislatures (or to courts for that matter) to say what activities are sufficiently "religious." Any legislative or judicial attempt at such a definition would surely fail. Worse, it would almost certainly undercut the neutral posture required of every branch of government under the Establishment Clause. [*Id.*]

The court below adopted this reasoning, Pet. App. 13a-14a, quoting *Amos* for the proposition that "it is a significant burden on a religious organization to require it * * * to predict which of its activities a secular court will consider religious." *Id.* 14a (quoting 483 U.S. at 336).

II. THERE IS NO CONFLICT IN THE LOWER COURTS.

1. Although petitioners allege a conflict among the lower courts, it is remarkable that each of the cases they discuss actually came out the same way as the decision below—holding that the particular legislative accommodation of religious exercise at issue did not violate the Establishment Clause. Pet. 18-23. Petitioners make much of the fact that there were dissents in those cases, but the criteria for certiorari speak of a conflict between decisions of courts of appeals or state courts of last resort, not disagreement within particular panels. *See* S. Ct. Rule 10. The lower courts are in fact completely in accord in following the approach to accommodation of religious exercise this Court articulated in *Amos*; the dissenting opinions simply confirm that the issue was carefully considered and debated before being resolved.

See United States Railroad Retirement Bd. v. *Fritz*, 449 U.S. 166, 177 n.10 (1980) ("The comments in the dissenting opinion * * * are just that: comments in a dissenting opinion.").

Recognizing that the cases on which they rely for a purported conflict among the lower courts all come out the same way, petitioners assert that what matters is not "which side was correct," but rather that serious questions are arising "over the principles that govern, or should govern, religious accommodation." Pet. 21. Not so. Just as the dissent agreed with the majority's analytic approach below, and only disagreed over "where they have drawn the line in this case," Pet. App. 17a, so too in the cases on which petitioners rely. In those cases as well there was little debate "over the principles that govern * * * religious accommodation," and only disagreement over application of those principles to particular facts.[4]

Thus, for example, in *Boyajian* v. *Gatzunis*, 212 F.3d 1 (1st Cir. 2000), *cert. denied*, 69 U.S.L.W. 3455 (Jan. 8, 2001), the First Circuit, like the court below, recognized that a legislative decision "to give religion an assist in the local land-use

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[4] In an effort to latch onto any plausible conflict—regardless of whether it is implicated in this case—petitioners suggest that this case is "an appropriate vehicle for resolving the recurring debate over *Lemon*'s general viability." Pet. 21. Petitioners have always argued strenuously in *favor* of applying that test in this case, *see, e.g.*, Ct. App. Br. 10-11; J.A. 170, and those Justices who have suggested modifying the test have argued in favor of affording broader scope for government to legislate without running afoul of the Establishment Clause. *See, e.g.*, *Kiryas Joel*, 512 U.S. at 750 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.); *Lamb's Chapel* v. *Center Moriches Union Free Sch. Dist.*, 508 U.S. 384, 398 (1993) (Scalia, J., concurring in the judgment, joined by Thomas, J.); *Wallace* v. *Jaffree*, 472 U.S. 38, 112 (1985) (Rehnquist, J., dissenting). Any reconsideration of *Lemon* along those lines would certainly not benefit petitioners.

planning process is consistent with the Supreme Court's holding in *Amos* that legislation isolating religious groups for special treatment is permissible when done for the 'proper purpose' of alleviating a burden on the exercise of religion." *Id.* at 8 (citing *Amos*, 483 U.S. at 337-338). The First Circuit noted that this was particularly true given the extensive evidence of "discrimination against religion in the land use context." *Id.*

Petitioners make much of the dissent in *Boyajian*, Pet. 19, but neglect to mention that the dissenting judge—like the dissenter here—began by noting his *agreement* with the majority's articulation of the applicable legal standards:

> I am largely in agreement with the majority as to the legal standards which—fuzzy as they may be—apply to this case. However, my *application* of those standards leads me to a different result than that reached by the majority. [212 F.3d at 11 (Torruella, C. J., dissenting) (emphasis added).]

As already noted, such disagreement over the application of a standard to particular facts is not a basis for certiorari. S. Ct. Rule 10. [5]

Neither the majority nor the dissent in the Eighth Circuit decision cited by petitioners, *Children's Healthcare Is A Legal Duty, Inc.* v. *Min de Parle*, 212 F.3d 1084 (8th Cir. 2000), *pet. for cert. filed*, 69 U.S.L.W. 3410 (Nov. 27, 2000), No. 00-914, conflicts with the decision below. Both the majority and dissent—like the court below—applied *Amos* and recognized that "the alleviation of a special, government-created burden on religious belief and practice constitutes a

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[5] Petitioners recognized that the petition for certiorari in *Boyajian* presented questions "largely similar to those presented here." Pet. 19 n.7. This Court denied that petition without recorded dissent on January 8, 2001—the same day the present petition was filed. 69 U.S.L.W. 3455.

valid secular purpose under *Lemon*," *id.* at 1093 (majority), and that "the accommodation of religion, *i.e.*, the alleviation of significant governmental interference with the exercise of religion, can constitute a permissive secular purpose." *Id.* at 1104 (dissent).

There is of course no conflict with *East Bay Asian Local Dev. Corp.* v. *State*, 102 Cal. Rptr. 2d 280 (Cal. 2000). The court in that case expressly relied upon the opinion below. *Id.* at 297-298 (finding that the Fourth Circuit opinion in *Renzi* "supports our conclusion"). The petition invokes Justice Mosk's dissent in *East Bay Asian*, Pet. 20, without noting that it was based on the California state constitution. *See* 102 Cal. Rptr. 2d at 302 ("Our state constitutional law is analytically distinct and more protective of the principle of church-state separation than the First Amendment.") (Mosk, J., dissenting); *id.* at 304 (dissent's conclusion based on state constitutional provisions) (same). The other dissenting opinion in *East Bay Asian* specifically recognized that "government may target help to religious individuals and groups, in the form of relief from the burdens of generally applicable legislation, when application of the general law would significantly impair the person's or group's free exercise of religion." *Id.* at 305 (Werdegar, J., dissenting) (citing, *inter alia*, *Amos*, 483 U.S. at 334-336). That is, of course, the proposition on which the court below relied. Justice Werdegar agreed with the dissent below that there was a "lack of a showing of significant burden" in our case, *id.* at 321 n.12, but—as explained—such disagreement over application of the *Amos* standard is certainly not grounds for certiorari, particularly coming in a dissent rather than a court holding.

2. Petitioners posit another conflict purportedly implicated by the decision below, over whether the burdens an exemption imposes on third parties should be considered in assessing the constitutionality of an accommodation of religion. Pet. 23-25. That issue is not properly before this

Court because it was not raised below. *See* Pet. App. 6a (reviewing arguments raised by the Renzis); *FW/PBS, Inc.* v. *Dallas*, 493 U.S. 215, 224 (1990) ("It is this Court's practice to decline to review those issues neither pressed nor passed upon below."). Petitioners argued in favor of applying the *Lemon* test in assessing the exemption at issue, and never pointed to any purported burden on third parties as part of the application of that test. *See* Ct. App. Br. 10-11. It is too late to raise that issue for the first time in a petition for certiorari.

In any event, the issue is a red herring. We are dealing with legislative accommodations of religion. So long as the accommodation passes constitutional muster, the weighing of respective burdens in deciding whether to adopt the accommodation is a matter for the legislative body, just as it is in any other case of legislation.

III. INTERVENING LEGISLATION MAKES THIS CASE AN ILL-SUITED VEHICLE FOR CERTIORARI.

Even if the questions presented by the petition met this Court's customary criteria for certiorari, this case would be a particularly ill-suited vehicle for considering those issues. On September 22, 2000—shortly after the Court of Appeals issued its decision in this case—Congress enacted the Religious Land Use and Institutionalized Persons Act of 2000, Pub. L. No. 106-274, 114 Stat. 803 (codified at 42 U.S.C. § 2000cc *et seq.*). That Act specifically addresses the effect of land use regulations on religious exercise and prohibits regulations imposing the very burdens that would be placed on respondent by subjecting it to the special exception procedure involved in this case.

The Act broadly proscribes any government—federal, state, or local—from "impos[ing] or implement[ing] a land use regulation in a manner that imposes a substantial burden on the religious exercise of a person, including a religious assembly or institution," unless the government demonstrates

that such burden (1) "is in furtherance of a compelling governmental interest[,]" and (2) "is the least restrictive means of furthering that compelling governmental interest." *Id.* § 2000cc(a)(1)(A), (B). "Land use regulation" is defined as "a zoning or landmarking law * * * that limits or restricts a [person's] use or development of land," if the person has an "ownership, leasehold * * * or other property interest in the regulated land." *Id.* § 2000cc-5(5). "Religious exercise" specifically includes "[t]he use, building, or conversion of real property for the purpose of religious exercise." *Id.* § 2000cc-5(7)(B). The Act provides that it "shall be construed in favor of a broad protection of religious exercise," *id.* § 2000cc-3(g), and creates a private right of action and defense in favor of aggrieved persons. *Id.* § 2000cc-2(a). The Act also specifically contemplates exemptions such as the one at issue here, providing that "[a] government may avoid the preemptive force of [the] Act * * * by providing exemptions from [a] policy or practice for applications that substantially burden religious exercise." *Id.* § 2000cc-3(e).

This legislation not only validates the reasoning of the Court of Appeals below, but provides an independent basis for upholding the exemption at issue here. As the Court of Appeals concluded, exempting respondent from the special exception procedure "lifts a burden from the school's exercise of religion." Pet. App. 14a. That burden is substantial. As the court further observed, the special exception procedure would subject respondent to "the rigorous review of numerous subjective factors that otherwise could interfere with the implementation of its mission" and force respondent "to justify its religious or religion-related needs before civil authorities." *Id.* 11a. Protecting religious institutions from such interference is one of the core concerns underlying the Act. *See* 146 Cong. Rec. S6688, S6690, S7774 (July 27, 2000). Petitioners have not identified any "compelling governmental interest" that could be served by the imposition of such a substantial burden on religious exercise.

The intervening passage of the Act—providing an independent basis for upholding the exemption—is an additional reason to deny certiorari. The Act answers petitioners' contention that "legislatures, county commissions and town councils across the nation" have a "need for clear rules governing religious accommodations in situations such as these." Pet. 28-29. The Act provides clear rules. The exemption in this case is indisputably consistent with the Act. Any consideration of constitutional issues in this area by this Court—if necessary—should take place in the context of application of the Act.

* * * *

In sum, the petition presents for review a case in which:

- There is no conflict among the lower courts;
- The majority below "plow[ed] no new ground" and even the dissent "agree[d] with the analytical approach taken by the majority," Pet. App. 17a;
- The main objection petitioners raise concerns the "remote" possibility that the statute might hypothetically be applied to others in a very different factual context, *id.* 13a;
- An alternative holding unaddressed by petitioners bars consideration of their central complaint;
- Congress has addressed the questions presented in comprehensive legislation enacted after the decision below;
- Some arguments in the petition were never raised below; and
- The Court within the past month denied a petition that petitioners themselves contend presented issues "largely similar" to their own. Pet. 19 n.7.

It is difficult to imagine a less attractive candidate for certiorari.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

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No. 00-1118

IN THE

Supreme Court of the United States

VINCENT RENZI, *et al.*,
Petitioners,

v.

CONNELLY SCHOOL OF THE HOLY CHILD, INC.,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The decision in this case upholds an exemption from zoning laws that singles out for special advantage not religious schools, but *religious landowners*, specifically those who operate – or lease their property to others to operate – private schools of any kind on their property. As one academic commentator recently observed, in full agreement with our petition, the decision in this case is "[b]ased on strained reasoning and misreading of precedent," and "allows the state to endorse religious purposes – and landowners – over secular ones in violation of the Establishment Clause." *Recent Cases—Constitutional Law—Establishment Clause—Fourth Circuit Upholds Zoning Exemption for Religious Institutions*, 114 Harv. L. Rev. 932, 932 (2001).

Respondent urges the Court to deny review of this extraordinary decision, even though respondent does not dispute (i) that the petition raises recurring issues of substantial national importance; (ii) that these issues have generated significant controversy in the federal and state courts; or (iii) that the decisions of this Court have provided representative governmental bodies at all levels with very little guidance as to the kinds of statutory exemptions for religious practices and practitioners that will withstand constitutional scrutiny. Instead respondent labors to minimize – or avoid altogether – both the conflict between this Court's decisions and the decision below, and the various conflicts between and among the federal and state courts. Respondent even attempts to invoke the enactment of yet another congressional statute intended to "overrule" *Employment Division v. Smith*, 494 U.S. 872 (1990), suggesting contrary to logic that the statute could trump a conclusion by this Court that an exemption violates

the First Amendment's Establishment Clause. None of these arguments justify denial of the petition.[1]

1. Respondent begins by arguing that the majority opinion below does not conflict with any decisions of this Court. For this, respondent principally relies on the majority opinion's own announcement that it "plow[s] no new ground" in upholding the religion-specific exemption, Pet. App. 17a, *see* Resp. Br. 2, 19, and on the fact that the majority opinion accurately quotes the accommodation standard enunciated in *Corporation of Presiding Bishop v. Amos*, 483 U.S. 327, 335 (1987), *see* Resp. Br. 7. Respondent contends that our disagreement is only "with the application by the court below of the test set forth in *Amos*, not with the test or approach adopted by the lower court." Resp. Br. 7. Respondent is wrong.

(a) It is of course hardly surprising that a lower court opinion would declare itself in accordance with this Court's precedents. But as the petition made very clear, the problem with the majority opinion is that despite its rote citation of *Amos*, the opinion makes no effort – none at all – to do what *Amos* and other precedents would require, *viz.*, explain how an exemption for any kind of private school on land owned or leased by a religious organization could be said to lift a significant burden on the religious practices of the *religious landowner*. Pet. 16. The opinion does recite the zoning burdens *religious schools* would have to bear in the absence of the exemption – and respondent dutifully repeats that recita-

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[1] Though respondent's insistence that it "has acted throughout with sensitivity to the concerns of its neighbors," Resp. Br. at 4, is ultimately immaterial to the question whether the Court should grant review, we note that all of the activities respondent cites in support of that assertion occurred only after respondent had rebuffed repeated efforts by neighbors to meet with respondent to discuss its plans, Ct. App. J.A. 729, and only after petitioners first initiated legal proceedings in 1997 to compel respondent to account for neighbors' concerns, *id.* at 553.

tion, Resp. Br. 3, 9 – but all of that is beside the point: the goal of alleviating burdens on religious schools simply cannot justify an exemption not even targeted specifically at such schools. *See Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 44 (1989) (Scalia, J., dissenting) (tax exemption in earlier case "applied to trade publications and sports magazines along with religious periodicals and sacred writings, and hence *could not be justified* as an accommodation of religion" (emphasis added)).

To justify the exemption's application to religious landowners, the majority opinion mints a new, *per se* rule that would sanction *any* exemption from generally applicable legal burdens so long as the "defining aspect" of the exemption is religion. Pet. App. 14a. That conclusion plainly conflicts not just with *Amos*, but with *Texas Monthly*, and every other religious-accommodation precedent of this Court. And though respondent relies heavily on the dissenting judge's statement that he "agree[s] with the analytical approach taken by the majority" in applying the *Amos* principle, Pet. App. 17a, what demonstrates the need for review – and what respondent therefore ignores – is the dissent's ultimate conclusion that the majority opinion in fact "*inappropriately expand[s]* the *Amos* principle, and, as a result, travel[s] down a path that will ultimately render the Establishment Clause meaningless," Pet. App. 18a (emphasis added).

(b) In struggling to avoid the inevitable conflict with *Amos*, respondent is forced to retreat to a misconceived – and mislabeled – "standing" argument based on part of the lower court's opinion. According to respondent, petitioners have no "standing" to challenge the exemption on the basis of a "hypothetical possibility that it might be applied in the case of a secular school." Resp. Br. 9; *see* Pet. App. 13a. Such a challenge, the lower court had reasoned, violates the "'traditional rule'" that "one 'to whom a statute may be constitutionally applied may not challenge the statute on the ground

that it may conceivably be applied unconstitutionally to others in situations not before the court.'" Pet. App. 13a (quoting *Los Angeles Police Dep't v. United Reported Pub'g Corp.*, 528 U.S. 32, 38 (1999)); *see* Resp. Br. 5, 9-13.

Respondent's "standing" argument is, with all due respect, frivolous. It is also wholly irrelevant to the lower court's holding. It is, in short, no barrier to review here.

In accordance with this Court's cases, petitioners below noted the statute's application to secular schools in order to establish that the statute, on its face, lacks the asserted "secular purpose" of accommodating the religious practices of religious schools. *See Santa Fe Ind. Sch. Dist. v. Doe*, 120 S. Ct. 2266, 2281 (2000) ("Our Establishment Clause cases involving facial challenges . . . have not focused on the possible applications of the statute, but rather on whether the statute has an unconstitutional purpose."). And, of course, "a court *must* invalidate a statute if it lacks 'a secular legislative purpose.'" *Id.* at 2282 (emphasis added). Thus the fact that the exemption on its face benefits not only respondent but also any religious landowner who leases its property to a secular educational entity, goes to show *not* that it could be applied unconstitutionally in *some other* cases, Pet. App. 13a, but that it is applied unconstitutionally in *every* case – including this one – because it lacks the secular purpose of accommodating the religious practices of religious schools.

Aside from reflecting an obvious category mistake, respondent's "standing" argument rests entirely on a part of the opinion below that is the purest form of dicta. In response to petitioners' argument below that the statute's overbroad facial application establishes the lack of a secular purpose, the majority made two separate arguments. The first was that petitioners could not rely on the fact that the exemption applies equally to secular schools on property owned by religious organizations, because their "standing derives from the status as neighbors challenging the particular improvements

and additions being constructed by the Connelly School, a religious school operated on property owned by a religious organization." Pet. App. 13a. As we have seen, that argument is no response at all on the issue of the exemption's secular purpose. For good reason, then, the court did not rest its analysis on that argument, but actually went on to address the implications of the statute's application in other contexts, and specifically held that the possibility of applications to secular schools does not render the statute unconstitutional. Pet. App. 13a-14a. Even though the exemption confers a commercial benefit on religious organizations that lease their property to secular entities for nonreligious educational instruction, the court held that the exemption is permissible simply because "religion is the defining aspect of the exemption." Pet. App. 14a. That conclusion, at bottom, is what sustains the exemption in the lower court's view. And the conflict between that conclusion and this Court's precedents is squarely presented by the lower court's opinion.[2]

2. Respondent next contends that there is no controversy in the lower courts demonstrating the need for review of this case. In the face of sharp and remarkably consistent divisions within the decided cases, respondent argues that the differences are simply matters of application, not principle, Resp. Br. 14, and that the divisions demonstrate only that "the issue was being carefully considered and debated before being resolved," Resp. Br. 13. Those arguments are incomplete, inaccurate and unpersuasive.

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[2] The dicta concerning other applications plainly is not an "alternative holding" that "bars consideration of [our] central complaint." Resp. Br. 19. Rather, as explained in the text, it is merely a subsidiary aspect of the court's reasoning as to why the statute has the permissible secular purpose of accommodating religion. It is therefore necessarily included within the scope of the central question presented here, *viz.*, whether the statute, on its face, violates the Establishment Clause because it cannot be justified as an accommodation of religion. *See* Pet. i.

(a) To begin with, respondent utterly ignores the split in the courts – and in the opinions of members of this Court – over whether the *Lemon* test has been modified in the religious accommodation context. *See* Pet. 21-23. That is indisputably a dispute over principle, and as the petition explains, it is a conflict exacerbated by the majority opinion below. *See id.* at 22; *see also Recent Cases*, *supra*, 114 Harv. L. Rev. at 934-35 ("In *Ehlers-Renzi*, the murky contours of the *Lemon* test allowed the majority to treat assistance as nonassistance in order to find that the government was not acting to establish religion."). Review would enable this Court to resolve the persistent conflict over *Lemon*'s application in this context.

(b) Respondent also ignores the related confusion wrought by the ambiguous suggestion in *Amos* that a religion-specific exemption is unconstitutional not if it simply "*allows* churches to advance religion," but rather only if "the *government itself* has advanced religion." *Amos*, 483 U.S. at 337. As the petition explained, both the majority opinion below and the California Supreme Court majority opinion in *East Bay Asian Local Dev. Corp. v. State*, 24 Cal.4th 693 (2000), interpreted that passage as authorizing the government to use exemptions to confer significant commercial advantages on religious organizations. *See* Pet. 26-27. As these courts see it, such benefits do not have the "effect" of advancing religion because any success the religious organization achieves, even with the benefit, comes ultimately from the persuasive power of its message and not directly from the benefit itself. *See id.*; *see also Recent Cases*, *supra*, 114 Harv. L. Rev. at 939 ("The *Ehlers-Renzi* court misapplied the second prong of the *Lemon* test by holding that the exemption for the zoning ordinance does not have the effect of impermissibly assisting religion. The court . . . extricated itself from claims that it was allowing the government to endorse religion by suggesting that it had not assisted religion, but had merely lifted a burden by allowing an exemption.

Such a reliance on act/omission rhetoric seems disingenuous."). The opportunity to correct that misimpression is reason enough to grant review.

(c) In respect to *other* issues raised by the petition that respondent does address, respondent suggests that those issues are settled enough to provide courts and other government actors clear guidance in resolving religious accommodation problems. The record refutes that suggestion.

Although respondent attempts to minimize the disagreements, the sharply split decisions of the four courts that have issued opinions in religious accommodation cases in the last year alone reflect the severity of the divisions over religious accommodation principles. Contrary to respondent's protestations, these are not just differences over applications to different facts. As with the split opinions below, it is no surprise that opinions on both sides of the issue would agree that the *Amos* standard "applies" in religious accommodation cases. The critical question, however, is what that standard *means*. Just as the dissent below concluded that the majority's purported "application" of *Amos* in fact altered the very nature of the *Amos* principle, so, too, do the divided opinions in other cases ultimately reflect fundamental disputes over the meaning and content of the *Amos* principle.

For instance, while respondent is correct that in *Children's Healthcare Is A Legal Duty, Inc. v. Min de Parle*, 212 F.3d 1084 (8th Cir. 2000), "[b]oth the majority and the dissent . . . applied *Amos*," Resp. Br. 15, respondent overlooks the dissent's conclusion that "the logic employed by the majority would allow nearly anything to be deemed a burden so as to permit an accommodation." 212 F.3d at 1106.[3] Even more striking is the divergence between the analytical approaches taken by the majority and two dissenting opinions

[3] A petition for certiorari was filed in *Children's Healthcare*, No. 00-914, on November 27, 2000. *See* 69 U.S.L.W. 3410 (Nov. 27, 2000).

in *East Bay*. *See* Pet. 19-20.[4] The majority opinion holds that even unproved, purely hypothetical burdens on religion suffice to justify religion-specific exemptions, *see id.* – a holding that respondent, notably, makes no effort to defend – whereas Justice Mosk's dissent, for example, proclaims that "[t]he majority's flawed approach could be used to justify exempting religious organizations from any law of general applicability," 24 Cal.4th at 724.[5] And the dissent in *Boyajian v. Gatzunis*, 212 F.3d 1 (1st Cir. 2000), while agreeing generally with the legal standards invoked by the majority, concludes that the majority applies those standards to uphold an exemption that "eschews neutrality to place religion in an exalted position," *id.* at 12, surely a constitutional objection to be taken seriously.[6]

3. Respondent's final argument against review rests on the Religious Land Use and Institutionalized Persons Act ("RLUIPA"), a federal law recently enacted "in another attempt to overrule *Smith*." *Recent Cases*, *supra*, 114 Harv. L. Rev. at 938 n.42; *see* Resp. Br. 17. RLUIPA has nothing to do with this case, and provides no reason to delay resolution of the controversy over the constitutional issues raised here.

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[4] A petition for certiorari in *East Bay* is due March 21, 2001, and counsel for the plaintiffs has informed us they intend to file the petition.

[5] Respondent's assertion that Justice Mosk's dissent "was based on the California state constitution," Resp. Br. 16, is inaccurate: Justice Mosk expressly stated that his analysis applied equally to the federal Establishment Clause. 24 Cal.4th at 724 n.1.

[6] In noting that this Court denied certiorari in *Boyajian* on January 8, 2001, respondent fails to mention that, as explained in the petition, unlike in this case the exemption at issue in *Boyajian* was available to a wide array of secular and nonsecular groups, Pet. 19 n.7, which – as also explained in the petition – would likely render it constitutional under this Court's precedents, *id.* at 13-14. Thus, even though *Boyajian* opinions did invoke additional issues "largely similar to those presented here," *id.* at 19 n.7, the key fact necessary to resolve that case is not present here.

Respondent's reliance on RLUIPA reflects another simple category mistake. This case arises not under RLUIPA, but under the federal Constitution; the question is whether the Montgomery County zoning ordinance violates the First Amendment's Establishment Clause. Congress has no authority to answer that question by statute, and RLUIPA does not purport to provide any answer. Thus, even assuming respondent were correct that the exemption in this case is permissible under RLUIPA – and respondent is assuredly not correct[7] – any such statutory authorization could not trump a conclusion by this Court that the exemption violates the federal Constitution. The same would be true in any case raising an Establishment Clause challenge to a religious-accommodation exemption. In short, it would be literally impossible for this Court to adopt respondent's suggestion to delay "consideration of constitutional issues in this area" for their presentation "in the context of application of the Act." Resp. Br. 19. RLUIPA does not – and could not – present the constitutional issues raised in this case, and the Act in no way undermines the need to clarify the constitutional standards that govern legislative decisionmaking in this important area.

* * * *

In the end, respondent's own brief – in particular, its characterization of the divided opinions in this and other cases – amply confirms the need for review. The heart of respondent's argument is that there is no judicial controversy

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[7] Respondent states that RLUIPA "validates the reasoning" of the majority opinion in this case and "provides an independent basis for upholding the exemption at issue here." Resp. Br. 18. But RLUIPA only authorizes exemptions from laws that "substantially burden religious exercise," 42 U.S.C. § 2000cc-3(e), and there has never been a showing that the exemption here lifts a burden of any kind on the religious practices of the landowners whom it benefits. Thus, the exemption could not be upheld under RLUIPA any more than under this Court's cases.

worthy of clarification simply because opinions on both sides of the issue consistently invoke the statement in *Amos* that a religion-specific exemption, to be a permissible religious accommodation, must "alleviate significant governmental interference with the ability of religious organizations to define and carry out their religious missions." *Amos*, 483 U.S. at 335; *see* Resp. Br. 7, 14-16. In point of fact, that only *identifies* the problem: the controlling precedents speak at too high a level of generality and have too few applications to provide concrete meaning, leaving lower courts with insufficient guidance for evaluating religious accommodation challenges – to say nothing (and respondent says nothing) of the inadequate guidance left for other government actors less schooled in applying ambiguous language from this Court's opinions. The predictable result is sharply split lower-court decisions, repeated requests for review by this Court, *see supra* notes 3, 4 & 6, and legislative uncertainty in an area already rife with the potential for community division.

It has been more than a decade since *Amos* and *Texas Monthly* were decided. Since then, this Court in *Smith* effectively withdrew the judiciary from the project of exempting private religious practices from generally applicable laws, leaving that burden squarely on the shoulders of the Nation's democratic decisionmakers. This is the ideal time for renewed guidance from this Court as to how our lawmakers may pursue the important objective of relieving religious groups of significant legal burdens on their religious practices without transgressing fundamental Establishment Clause principles.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, the petition should be granted.

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